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Recovery for Psychic Harm in Strict Products Liability: Has the Interest in Psychic Equilibrium Come the Final Mile?

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RECOVERY FOR PSYCHIC HARM IN STRICT PRODUCTS LIABILITY: HAS THE INTEREST IN PSYCHIC EQUILIBRIUM COME THE FINAL MILE?

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I. INTRODUCTION

More than a century has elapsed since Lord Wensleydale declared that "[m]ental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone,"[1] and nearly a century has passed since American courts first denied recovery for psychic injuries.[2] Plaintiffs suffering tortiously inflicted psychic harm, however, have continued to seek legal redress. Though the road has been uphill and the journey torturously slow, the march toward legal recognition of psychic equilibrium as an independently-protected interest has been significant. Gradually, psychic harm has evolved from an item of damage recoverable only if parasitic to another cause of action,[3] to a harm recompensed when caused intentionally;[4] and, more re-

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[1] Lynch v. Knight, 11 Eng. Rep. 854, 863 (1861).

[2] *See* Braun v. Craven, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898); Spade v. Lynn & Boston R.R., 168 Mass. 285, 286, 47 N.E. 88, 89 (1897), *overruled*, Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Ward v. West Jersey & Sea Shore R.R., 65 N.J.L. 383, 385, 47 A. 561, 561 (1900), *overruled*, Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); *see also* Mitchell v. Rochester Ry., 151 N.Y. 107, 109, 45 N.E. 354, 354 (1896), *overruled*, Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Huston v. Fremansburg Borough, 212 Pa. 548, 549, 61 A. 1022, 1022 (1905), *overruled*, Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970). *But see* Hill v. Kimball, 76 Tex. 210, 214-15, 13 S.W. 59, 59 (1890) (recovery for fright-induced miscarriage caused by plaintiff's witnessing violent assault), *overruled*, Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983).

[3] *See, e.g.*, Gadsen Gen. Hosp. v. Hamilton, 212 Ala. 531, 532, 103 So. 553, 554 (1925) (false imprisonment); Kline v. Kline, 158 Ind. 602, 603, 64 N.E. 9, 10 (1902) (assault); Fisher v. Rumler, 239 Mich. 224, 228, 214 N.W. 310, 311 (1927) (false imprisonment); Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922); Harper & McNeely, *A Re-examination of the Basis for Emotional Distress*, 1938 WIS. L. REV. 426, 429; Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260, 279-81 (1921).

[4] *See, e.g.*, Wilson v. Wilkins, 181 Ark. 137, 138-39, 25 S.W.2d 428, 428 (1930); State

cently, to a harm redressed when caused negligently.[5] Despite these broad developments, however, many courts are still reluctant to offer full-scale protection to the interest in psychic equilibrium.

In contrast to the slow emergence of psychic equilibrium as an independently recognized interest, the area of strict products liability has burst suddenly from the common law of torts in just the past two decades to protect the American consumer from the injuries caused by defective products.[6] Since 1965, when the American

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Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 333, 240 P.2d 282, 285 (1952); Barnett v. Collection Serv. Co., 214 Iowa 1303, 1310-11, 242 N.W. 25, 28 (1932); *see also* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982) (mere intent to cause harm suffered may give rise to liability for psychic injury); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 40-43 (1956); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 878 (1939) [hereinafter cited as Prosser, *Suffering*].

[5] *See* Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369, 374 (Ala. 1981); Dillon v. Legg, 68 Cal. 2d 728, 747-48, 441 P.2d 912, 925, 69 Cal. Rptr. 72, 85 (1968); Montinieri v. Southern N.E. Co., 175 Conn. 337, 345-46, 398 A.2d 1180, 1184 (1978); Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAWAII L. REV. 1, 3-9 (1979); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1245-48 (1971); Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 514-17 (1968).

[6] The first formulation of a strict products liability doctrine appeared in a concurring opinion by Justice Traynor in 1944. *See* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring). It was not until 1966, however, that the doctrine was actually adopted. *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962). In *Greenman*, the court held: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.*

The development of products liability as the basis for recovery began long before either *Escola* or *Yuba*. A major step in this development occurred in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), in which Judge Cardozo abolished the requirement of privity in cases involving negligently manufactured products. *Id.* at 389, 111 N.E. at 1055. Other jurisdictions quickly adopted the rule that lack of privity is not a defense in a negligence action for a defective product. *See, e.g.*, Johnson v. Cadillac Motor Co., 261 F. 878 (2d Cir. 1919).

A second major development in the growth of products liability was the recognition of implied warranties of quality in the sale of products. *See* U.C.C. § 2-314 (1978) (merchantability); *id.* § 2-315 (fitness for particular purpose); *see also* Southern Iron and Equip. Co. v. Railway Co., 151 S.C. 506, 525, 149 S.E. 271, 278 (1929) (implied warranty of freedom from defects). Although privity was initially a requirement in implied warranty cases, *see* Mazetti v. Armour & Co., 75 Wash. 622, 624, 135 P. 633, 634 (1913), the majority of American jurisdictions eventually recognized that lack of vertical privity was not a defense for breach of an implied warranty in the sale of products, *see, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 84 (1960); *see* U.C.C. § 2-318 (1978); Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791-

Law Institute adopted section 402A of the Restatement (Second) of Torts,[7] virtually all jurisdictions have embraced strict products liability.[8]

It is not difficult to imagine accidents caused by defective products which result in psychic rather than physical injury—a defective mobile home catches fire causing an occupant who escapes with no physical injuries to suffer a severe traumatic neurosis;[9] a defective car door unlatches, causing a child to fall to the highway and causing his mother to suffer a severe psychic shock.[10] Thus, it was inevitable that these two areas of law—strict products liability and recovery for psychic harm—would intersect. Recently, a num-

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800 (1966).

Despite the abolition of the privity requirement in negligence and warranty actions, plaintiffs continued to experience difficulty in recovering for product-related injuries. One such difficulty arose in proving negligence in a products case. *See* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 457-58, 150 P.2d 436, 438-39 (1944). In warranty actions, defenses such as lack of notice and disclaimers of warranty prevented recovery. *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 61-62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1962); U.C.C. §§ 2-316, 2-607 (1978).

These difficulties have, to a great extent, been alleviated with the development of strict products liability as a basis for recovery, and, more particularly, with the drafting of section 402A of the Restatement (Second) of Torts, *see infra* note 7 and accompanying text.

[7] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

[8] *See, e.g.*, Pardue v. Seven-Up Bottling Co., 407 N.E.2d 1154, 1155-56 (Ind. Ct. App. 1980) (manufacturer strictly liable for personal injuries caused by explosion of bottle); Magee v. Jefferson Rental, 454 So. 2d 842, 845 (La. Ct. App. 1984) (recovery for injuries caused by negligently manufactured blade guards on power saw); Russel v. Ford Motor Co., 281 Or. 587, 589-90, 575 P.2d 1383, 1384 (1978) (manufacturer strictly liable for damage to plaintiff's truck caused by defective axle); *see* 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 4.41 (2d ed. 1973); W. PROSSER & W. KEETON, THE LAW OF TORTS 694 (W. Keeton 5th ed. 1984); Maleson, *Negligence is Dead but its Doctrines Rule Us From the Grave: A Proposal to Limit Defendant's Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 TEMP. L.Q. 1, 1-2 (1978).

[9] *See* Rahn v. Gerdts, 119 Ill. App. 3d 781, 783, 455 N.E.2d 807, 808 (1983).

[10] *See* Shepard v. Superior Court, 76 Cal. App. 3d 16, 18-19, 142 Cal. Rptr. 612, 613-14 (1977).

ber of courts have considered whether damages for emotional distress are recoverable in a strict products liability action.[11] The results have been inconsistent, both in the conclusions reached and in the legal analyses used to reach them.

The specific question to be examined in this Article is whether damages for psychic harm should be recoverable in a case based on strict products liability. In answering that question, it is necessary to consider first whether the law should at last confer its full protection upon the interest in psychic equilibrium. If, as this Article suggests, the time finally has come to characterize this interest as one worthy of independent legal recognition, the answer to the specific question posed should be "yes."[12] Not surprisingly, courts are reluctant to extend recovery for psychic harm to cases based on strict products liability. This resistance may be traced to at least three sources: (1) a continued refusal to recognize psychic equilibrium as an interest worthy of complete legal protection, (2) a fear that claims flowing from the protection of the interest will overwhelm the judicial system, and (3) a fear that limitless liability will result.[13]

On one hand, if an important interest has been invaded, it is irrational to deny recovery in a case based on strict products liability while allowing recovery in a case based on negligence or intentional tort. On the other hand, it would be naive not to recognize the legitimate concern of courts and scholars (not to mention product suppliers and their insurance carriers) engendered by the recent products liability explosion.[14] The goal of this Article is to devise a system for protecting the interest in psychic equilibrium without placing an undue burden on either the judicial system or the product manufacturer. To achieve that goal, this Article will focus first on the interest itself and the need to grant it full legal

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[11] *See, e.g., id.* at 18-19, 142 Cal. Rptr. at 613 (recovery permitted); Rahn v. Gerdts, 119 Ill. App. 3d 781, 783, 455 N.E.2d 807, 808 (1983) (no recovery); Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 443, 428 N.E.2d 596, 599 (1981) (no recovery), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Woodill v. Parke-Davis & Co., 58 Ill. App. 3d 349, 354-55, 374 N.E.2d 683, 687-88 (1978) (no recovery), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980); Walker v. Clark Equip. Co., 320 N.W.2d 561, 563 (Iowa 1982) (recovery permitted); *see* Joseph, *Dillon's Other Leg: The Extension of the Doctrine Which Permits Bystander Recovery for Emotional Trauma and Physical Injuries to Actions Based on Strict Liability in Tort*, 18 DUQ. L. REV. 1, 22-42 (1979); Note, *Emotional Distress in Products Liability: Distinguishing Users From Bystanders*, 50 FORDHAM L. REV. 291, 299-301 (1981).

[12] *See infra* notes 28-34 and accompanying text.

[13] *See infra* notes 35-40 and accompanying text.

[14] *See supra* notes 6-8 and accompanying text.

protection. Second, it will examine various methods of limiting liability in strict products liability cases dealing with psychic harm and recommend an effective one which will allow for full protection of the interest in psychic equilibrium without imposing overly burdensome liability. Finally, the Article will review the recent cases to determine how courts have actually dealt with psychic harm in a strict products liability context and point out how these courts might have more effectively resolved the various problems presented.

II. THE INTEREST IN PSYCHIC EQUILIBRIUM

The slow progress of the interest in psychic equilibrium from a legal non-entity toward legal recognition has been amply and ably chronicled elsewhere.[15] However, to explore fully the implications of extending recovery for psychic injury to a strict products liability context, and to understand the varying judicial responses to it, an examination of the interest itself and its struggle for complete legal recognition is necessary.

A. *Nature of the Interest in Psychic Equilibrium*

The Restatement (Second) of Torts defines interest as "an object of human desire."[16] It is the function of the law of torts to protect certain interests from unwarranted invasions and to provide a system of compensation when those invasions cause injury. Keeping our bodies and property free from harm is an object of human desire which has been afforded broad protection through the tort law system. However, we cannot hope to enjoy fully our physical well-being or our earthly possessions if our minds are in distress. The medical profession has long recognized that good mental health is an integral part of a healthy individual.[17] Because

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[15] *See,e.g.*, Langhenry, *Personal Injury Law and Emotional Distress*, 9 J. PSYCH. & L. 91 (1981); Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. FAM. L. 163, 165-68 (1976-1977); Nolan & Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 583-87 (1982); *see also* Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 501-13 (1982); Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1, 22-26 (1976).

[16] RESTATEMENT (SECOND) OF TORTS § 1 (1965).

[17] *See, e.g.*, G. JACOBY, THE UNSOUND MIND AND THE LAW 19-52 (1918); A. WATSON, PSYCHIATRY FOR LAWYERS 42-70 (1978).

of its profound effect on the realization of other human desires, the interest in psychic equilibrium merits the utmost protection. From the standpoint of tort law, however, this protection has not been achieved. An analysis of the concept of psychic equilibrium may reveal why such a vital interest has gained only partial legal protection, and why the protection it has received has been so slow in developing.

One problem has been definitional. The nature of the interest is difficult to describe.[18] Although many terms can be used to characterize the interest—mental tranquility, emotional stability, mental equilibrium, mental repose, peace of mind—none captures its essence. This difficulty of positive definition may be the reason why, more often than not, the interest is spoken of in terms of the harm done to it—the interest in freedom from emotional or mental distress, fright, mental anxiety, and mental anguish. This may, in fact, provide a more accurate characterization. Tort law cannot guarantee perfect happiness, but it stands ready to afford redress when a course of conduct, recognized as unacceptable to society, has caused harm. Fright, anxiety, distress, and anguish, though they remain within the psychic realm, are harms with which most of us can identify. Furthermore, in this difficult area, courts are perhaps more comfortable expressing themselves in terms that relate to digressions from societal expectations concerning socially acceptable behavior. The best the law can offer is protection against tortious invasions that interfere with whatever mental balance one has been able to achieve. For lack of more precise terms, this interest will be referred to as "psychic equilibrium" and injuries to this interest as "psychic harm."[19]

In addition to definitional problems, the interest in psychic equilibrium suffers from content problems as well. Psychic harm

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[18] *See* Smith, *Problems of Proof in Psychic Injury Cases*, 14 SYRACUSE L. REV. 586, 587 (1963).

[19] The word "psychic" was chosen because it is a broader term than either "emotional" or "mental" and includes both. In addition, it has more accurate medical significance than emotional or mental. "Psyche refers to the mind; the mental life including both the conscious and unconscious process." Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428, 430 (1957).

The word "equilibrium" was chosen because it has fewer positive connotations than words like tranquility, repose and peace of mind. Since the most the majority of us can hope for is some kind of balance or stability, the word equilibrium comes close to expressing this. It is defined as: "1a: a state of adjustment between opposing or divergent influences or elements; b: a state of intellectual or emotional balance . . . 2: a state of balance between opposing forces or actions." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 294 (1983).

can take many forms—fear, depression, anger, embarrassment, grief, and neurosis are all types of psychic suffering. The harm may be trivial and transitory or it may be serious and abiding.[20] Moreover, psychic responses to the same external stimuli may vary considerably from person to person.[21] A psychic shock may cause insomnia and severe depression in one person, vomiting and debilitating headaches in another, and no long-term negative effects in still another.[22]

The infinite number of forms that psychic distress can take is exceeded by the infinite number of stimuli that can cause it. It can be caused, for example, by a sudden apprehension that one is in immediate danger,[23] by an observation of injury to a loved one,[24] by giving birth to a deformed child,[25] by living with the knowledge that one may someday contract a serious disease,[26] or by knowledge that one has been instrumental in causing harm to another.[27] On the other hand, such distress may occur spontaneously and be traceable to no known or discernible cause. The amorphous character and subjective nature of the interest in psychic equilibrium itself, the large variety of harms affecting it, and the difficulty in determining the level of suffering have made it an elusive concept. Perhaps the most precise description of the legal interest in psychic equilibrium is the right not to have one's psychological boat rocked through a course of conduct that the law has deemed socially unacceptable. To the extent that harm caused by the rocking can be established, the tort compensation system should provide redress.

B. *Justifications Used to Deny Protection to the Interest in Psychic Equilibrium*

Early courts considering whether to grant relief to plaintiffs

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[20] *See* Smith, *Relations of Emotions to Injury and Disease: Legal Liability or Psychic Stimuli*, 30 VA. L. REV. 193, 281-91 (1944).

[21] *See* Smith, *supra* note 18, at 591.

[22] *See id.* at 613 (possible reactions to stimuli); *see also id.* at 604 (cases should be individually evaluated because response may be disproportionate to stimuli).

[23] *See, e.g.*, Allen v. Hannaford, 138 Wash. 423, 426, 244 P. 700, 701 (1926).

[24] *See, e.g.*, Shepard v. Superior Court, 76 Cal. App. 3d 16, 18, 142 Cal. Rptr. 612, 613 (1977).

[25] *See, e.g.*, Speck v. Finegold, 497 Pa. 77, 84, 439 A.2d 110, 114 (1981).

[26] *See, e.g.*, Adams v. Johns-Manville Sales Corp., 727 F.2d 533, 540 (5th Cir. 1984).

[27] *See, e.g.*, Kately v. Wilkinson, 148 Cal. App. 3d 576, 588, 195 Cal. Rptr. 902, 909 (1984).

suffering psychic harm concluded that injuries to the mind were too trivial and their physical consequences too remote to warrant legal protection.[28] The injuries were thought too difficult to prove, too easy to feign, and likely to impose too taxing a burden on the courts.[29]

A primary reason for the early rejection of claims for psychic harm was ignorance of the workings of the mind. The late nineteenth century jurist had little empirical information relating to the potential for serious suffering that invasions of psychic equilibrium could cause. Even if a jurist thought psychic harm might be serious, there existed no methods for acquiring proof that a particular claim was genuine, because the psychiatric branch of medicine was in its infancy. Since that time, however, psychiatric medicine has developed methods to plumb the depths of the psyche.[30] In light of these developments, the former assumption that psychic harm is trivial can no longer be accepted. It is now clear that psychic injuries can be both devastating and permanent.

Despite an increased understanding of the workings of the mind, the current concerns expressed by courts and tort scholars to some extent reiterate those of yesteryear. The most recent edition of Dean Prosser's treatise on torts [31] has recognized the three

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[28] *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896) (consensus of opinion that no recovery may be granted for mere fright), *overruled,* Batalla v. State, 10 N.Y.2d 237, 238, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35 (1961); *see also* Braun v. Craven, 175 Ill. 401, 413, 51 N.E. 657, 661 (1898) (nervous shock too remote to be considered proximately caused by negligence); Chittick v. Philadelphia Rapid Transit Co., 224 Pa. 13, 17, 73 A. 4, 6 (1909) (shock not natural and probable result of defendant's conduct); Victorian Ry. Comm'rs v. Coultas, 13 App. Cas. 222, 225-26 (1888) (nervous shock not an ordinary or natural consequence of negligence).

[29] *See* Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 317, 73 So. 205, 207 (1916); Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896), *overruled,* Batalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961). The *Baladoni* court stated:

> Damages, when confined to fright alone, is dealing with metaphysical, as contradistinguished from a physical, condition, with something subjective instead of objective, and entirely within the realm of speculation. So the damages suffered where the only manifestation is fright are too subtle and speculative to be capable of admeasurement by any standard known to the law.

15 Ala. App. at 317, 73 So. at 207. The *Mitchell* court observed that a grant of recovery for psychic harm would "naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation." 151 N.Y. at 110, 45 N.E. at 354-55.

[30] *See* Wasmuth, *Medical Evaluation of Mental Pain and Suffering,* 6 CLEV.-MAR. L. REV. 7, 7-11 (1957).

[31] W. PROSSER & W. KEETON, *supra* note 8.

continuing concerns in psychic injury cases as: (1) the trivial claim; (2) the falsified or imagined harm; and (3) the unfairness of imposing liability not in proportion to the negligent defendant's degree of fault.[32]

Although the fear of the false or trivial claim may once have had merit, it should no longer be troublesome. Just as modern psychiatry has discovered that injuries to the psyche may be devastating, it has also developed methods for determining whether serious psychic harm has actually occurred.[33] Thus, malingerers and liars may now be identified with a greater degree of certainty. Unlike most physical injuries, psychic harm can not objectively be ob-

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[32] *See id.* § 54, at 360-61. The concerns expressed in the fifth edition of Dean Prosser's treatise significantly differ from those appearing in the fourth edition, in which it is stated that "the only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims." *Compare* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 54 (4th ed. 1972) *with* W. PROSSER & W. KEETON, *supra* note 8, § 54, at 360-61.

[33] Research advances in the field of "Psychosomatic Medicine" were largely responsible for assisting a plaintiff in satisfying the burden of proof that his claim was genuine. *See* McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1, 81 n.265 (1949). For purposes of this discussion, the research may be divided into two general categories. Category I was primarily concerned with the identification of the signs—"those objective evidences of impaired structure, or function, which the trained observer can discover for himself by visual inspection or various means of examination, without relying upon the story the plaintiff tells him"—and symptoms—"subjective complaints, known only to the patient, such as headache, pain, ringing in the ears, etc."—that result from psychic harm. *See* Smith, *supra* note 18, at 593; *see also* Goodrich, *supra* note 3, at 498 (experimentation and observation have demonstrated effect of emotional distress on body). *See generally* Smith, *supra* note 20, at 212-26 (classification of emotional effects on physical well-being). By 1940, it was recognized that a powerful emotional stimulus could result in the following physiological harms: hypertension, neurocirculatory asthenia, tremors and contractures, mucous colitis, dyspepsia and gastritis, retention of urine, enuresis, impotence, dysmenorrhea, and Graves Disease. *See* Smith, *supra* note 20, at 217-19. Additionally, it was recognized that an individual's idiosyncrasies affected the severity of the resulting harm. *Id.* at 282; *see also* Havard, *Reasonable Foresight of Nervous Shock*, 19 MOD. L. REV. 478, 478-82 (1956) (reaction to shock may depend on predisposition to damages).

Research in Category II was concerned with the initial physiological reaction to an emotional stimulus. It was found that an individual goes through three distinct stages in response to an emotional stimulus. *See* Wasmuth, *supra* note 30, at 11. In Stage I (alarm reaction), the brain reacts to the stimulus, the adrenal gland secretes epinephrine into the bloodstream, the sugar content of the blood increases, breathing accelerates, and the heart rate quickens. *Id.* In Stage II (defense stage), the increase in epinephrine causes an increase in the hormone ACTH. This hormone prepares the body for prolonged resistance to the stimulus. *Id.* In Stage III (recovery stage), the body begins to repair itself if the stimulus was of a short duration and has been overcome. *Id.* If the stimulus persists, the body remains in Stage II or reverts to Stage I. *See id.* at 12. Additionally, accurate clinical tests were developed to evaluate the emotional trauma. *See id.* at 13. For example, it was found that variations in the number and changes in the structure of the white blood cells occurred as an individual went through the different stages. *Id.*

served and is not likely to be within the ken of the average jury. The nature and extent of psychic injuries can be conveyed to the court and jury only through expert psychiatric testimony, the value of which has been the subject of considerable controversy.[34] If courts continue to express distrust of expert psychiatric testimony regarding the genuineness of psychic injury, progress toward complete recognition of the interest in psychic equilibrium will be impeded.

The continuing fear that burdensome and disproportionate liability will be imposed on tortfeasors in cases involving psychic harm[35] is evinced by comment b to section 436A of the Restatement (Second) of Torts, which states that "where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance."[36] Apparently, the inference to be drawn is that the interest in being free from psychic harm is not important enough to be granted protection against tortious invasions of all kinds. Although the perceived problem of disproportionate liability has been considered in relation to claims for negligently caused psychic harm,[37] it has even greater impact when the theory underlying the action is strict products liability. Because liability may be imposed without regard to the defendant's culpability, in a strict liability case any amount of liability imposed would be wholly disproportionate to the degree of fault attributed to him. Thus, when the degree of culpability is a factor, the plaintiff in a strict products liability case would be without redress. To achieve full protection, the interest in psychic equilibrium must be recognized and vindicated regardless of the theory underlying the plaintiff's case or the culpability of the defendant.

Another difficulty that recently has troubled courts and schol-

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[34] *See, e.g.*, Tarasoff v. Regents of Univ. of Cal. 17 Cal. 3d 425, 437-38, 551 P.2d 334, 344-45, 131 Cal. Rptr. 14, 24-25 (1976); J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 295-303 (2d ed. 1975); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 430 (1952).

[35] *See* Payton v. Abbott Labs, 386 Mass. 540, 553, 437 N.E. 2d 171, 179-80 (1982). *See generally* W. PROSSER & W. KEETON, *supra* note 8, § 54, at 361 (perceived unfairness in imposing disproportionate financial burdens on a defendant); Miller, *supra* note 5, at 18-21 (disproportionate allocation of losses is key to problem of extending liability for psychic disturbance).

[36] RESTATEMENT (SECOND) OF TORTS § 436A, comment b (1965).

[37] *See, e.g.*, Payton v. Abbott Labs, 386 Mass. 540, 552-54, 437 N.E.2d 171, 178-80 (1982).

ars considering the interest in psychic equilibrium is the potential for unlimited and indefinite liability.[38] In fact, some courts regard this as the only legitimate reason remaining for denying full-scale protection to psychic equilibrium.[39] Although most of the discussion of this problem has centered on negligence, the problems are magnified in a strict products liability context, because traditional liability limitations such as proximate cause, contributory negligence, and various other defenses may be doctrinally inconsistent with a strict liability theory.[40]

Before the interest in psychic equilibrium can attain full legal recognition, the concerns discussed previously must be addressed and resolved. If protecting the interest would impose an onerous burden either on the judicial system or on product suppliers in strict liability cases, a careful weighing of competing interests should be undertaken. The interest in psychic equilibrium can be adequately protected and liability appropriately limited, however, without resort to arbitrary limitations or unjust line-drawing devices.

C. *History of Judicial Approaches to Psychic Equilibrium*

To understand contemporary judicial and scholarly attitudes toward recovery for psychic harm, it is necessary to examine at least briefly the evolutionary process that the interest in psychic equilibrium has undergone in the last century. If the reasons for denying recovery expressed by early courts have in fact been met and can be overcome, the interest in psychic equilibrium should be ready to take the final step to complete independence. However, an examination of recent cases reveals that several of the arbitrary line-drawing and liability-limiting devices used by early courts

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[38] *See, e.g.*, Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 849-50, 606 P.2d 944, 953 (1980); Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983); Tobin v. Grossman, 24 N.Y.2d 609, 615-17, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558-60 (1969); *see also* Miller, *supra* note 5, at 17-18; Note, *Negligent Infliction of Emotional Distress as an Independent Cause of Action in California: Do Defendants Face Unlimited Liability?* 22 SANTA CLARA L. REV. 181, 182 (1982) ; Note, *Rickey v. Chicago Transit Authority: Consistent Limitation on Recovery for Negligent Infliction of Emotional Distress in Illinois*, 17 J. MAR. L. REV. 563, 576-77 (1984).

[39] *See, e.g.*, Keck v. Jackson, 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979); Barnhill v. Davis, 300 N.W.2d 104, 106 (Iowa 1981); Tobin v. Grossman, 24 N.Y.2d 609, 618-19, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

[40] *See supra* note 37 and accompanying text.

have carried over.[41] Nevertheless, the legal status of the interest in psychic equilibrium has improved over the years, giving substance to Professor Street's observation that, "[a] factor which is to-day recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability."[42] Recognition of psychic harm as an independent basis of liability has not been reached completely, but the development of the interest in psychic equilibrium has, to date, followed classic lines.[43]

1. Recovery for Psychic Harm Parasitic to Another Action

Early English[44] and American[45] cases granted no independent protection to psychic equilibrium. Recovery for psychic harm was first allowed as an item of damage "parasitic" to a "host" tort.[46] Such a recovery was permitted whether the "host" cause of action was based on negligence, intentional tort, or strict liability.[47] Proof of the prima facie case in the "host" tort allayed the courts' fears

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[41] *See, e.g.*, Champion v. Gray, 420 So. 2d 348, 349 (Fla. Dist. Ct. App. 1982); Selfe v. Smith, 397 So. 2d 348, 350 (Fla. Dist. Ct. App. 1981).

In *Selfe*, the plaintiff, who was injured along with her son in a car collision, was denied recovery for her mental distress over her child's facial injury. *See* 397 So. 2d at 350. The court, in denying recovery, indicated that the "impact rule" had not been satisfied. *See id.* The impact rule has been defended as "verifying otherwise problematic injuries, or as drawing a needed if somewhat arbitrary line between compensable injuries and those that society requires be borne unrecompensed." *Id.*

In *Champion*, the plaintiff's wife died as a result of shock and grief caused by the sight of her daughter being struck and killed by the defendant's car. *See* 420 So. 2d at 349. The court held that since Florida adhered to the impact rule, damages could not be recovered for mental distress in the absence of physical impact. *See id.*

[42] 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906).

[43] *See id.*; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936); Smith, *supra* note 20, at 193-212.

[44] *See, e.g.*, Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222, 225-26 (1888); Chamberlain v. Boyd, 11 Q.B.D. 407, 412 (1883); Allsop v. Allsop, 157 Eng. Rep. 1292, 1294 (1861).

[45] *See, e.g.*, Spade v. Lynn & R.R., 168 Mass. 285, 286, 47 N.E. 88, 89 (1897) (no recovery for mental distress absent physical harm), *overruled*, Dzionski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978); Mitchell v. Rochester Ry., 151 N.Y. 107, 109, 45 N.E. 354, 354 (1896) (plaintiff cannot recover for injuries occasioned by fright), *overruled*, Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Huston v. Borough of Freemansburg, 212 Pa. 548, 550-51, 61 A. 1022, 1022-23 (1905) (no recovery for fright unconnected with physical injury), *overruled*, Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970).

[46] *See supra* note 3 and accompanying text.

[47] *See* Easton v. United Trade School Contracting Co., 173 Cal. 199, 201, 159 P. 597, 599 (1916); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 292, 23 S.W.2d 272, 275 (1929); Consolidated Traction Co. v. Lamberston, 59 N.J.L. 297, 302, 36 A. 100, 102 (N.J. Sup. Ct. 1896), *aff'd*, 60 N.J.L. 457, 38 A. 684 (1897).

that the claims were trivial or could not be satisfactorily proven. Under this approach, protection was at best indirect, because recovery was dependent on the existence of another tort action.

2. Intentional Infliction of Psychic Harm

The first major step toward recognition of psychic equilibrium as an important independent interest came with the protection against intentional inflictions of emotional distress.[48] Despite persuasive prompting from tort scholars, this step was taken with great hesitancy and fear of possible adverse consequences.[49] Although English courts, prior to 1900, recognized intentional infliction of emotional distress,[50] no American court acknowledged it until the middle of the twentieth century.[51] Since that time, however, intentional infliction of emotional distress has been regarded as an actionable wrong, with independent tort status.[52]

An examination of early cases recognizing intentional infliction of emotional distress as an independent cause of action reveals that the willingness to extend this protection was directly tied to the high degree of moral culpability of one who intentionally caused injury.[53] Because courts were insecure about the damage aspect of cases in which the only harm claimed was psychic, they focused instead on the egregious behavior of the defendant.[54] If

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[48] *See* Gadsden Gen. Hosp. v. Hamilton, 212 Ala. 531, 532-33, 103 So. 553, 554-55 (1925); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d. 330, 333, 240 P.2d 282, 284-85 (1952).

[49] *See* Givelber, *supra* note 4, at 46; Prosser, *supra* note 4, at 40; Prosser, *Suffering*, *supra* note 4, at 878-79. *See generally* W. PROSSER & W. KEETON, *supra* note 8, at 55-56.

[50] *See* Wilkinson v. Downton, [1897] 2 Q.B. 57.

[51] *See* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 333, 240 P.2d 282, 285 (1952); *see also* Prosser, *supra* note 4, at 40.

[52] *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46 provides, in pertinent part: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Id.*

[53] *See, e.g.*, Wilson v. Wilkins, 181 Ark. 137, 139, 25 S.W.2d 428, 428 (1930) (recovery for mental stress allowed when defendant committed wanton wrongs against plaintiff intending to cause such distress); Carrigan v. Henderson, 192 Okla. 254, 255, 135 P.2d 330, 332 (1943) (recovery for mental distress permitted "when induced by threats, verbal abuse, indignity, and wanton insult"); *see* Prosser, *Suffering*, *supra* note 4, at 878.

[54] *See, e.g.*, Savage v. Boies, 77 Ariz. 355, 358, 272 P.2d 349, 351 (1954) (police falsely represented to plaintiff that her husband and child were hospitalized with critical injuries); Digsby v. Carroll Baking Co., 76 Ga. App. 656, 659-61, 47 S.E.2d 203, 206-07 (1948) (use of profane language and threat of rape to collect debt from pregnant woman); Great Atl. & Pac. Tea Co. v. Roch, 160 Md. 189, 191, 153 A. 22, 23 (1931) (grocer delivered dead rat instead of loaf of bread to plaintiff); Wilkinson v. Downton, [1897] 2 Q.B. 57 (practical joker

medical science has developed sufficient expertise to determine whether psychic harm is real and serious however, courts no longer need to refer to the character of the defendant's behavior to determine whether damages should be awarded.

3. Negligent Infliction of Psychic Harm

The movement toward awards of damages for negligently caused psychic injuries has met with significant resistance, but persistent plaintiffs have continued to appeal to the courts for relief. Gradually, judicial opposition has diminished, and a growing number of jurisdictions now recognize a cause of action for negligent infliction of emotional distress.[55] Most jurisdictions entertaining such claims, however, retain some limitation on the right to recover.[56] In some instances, these limitations appear to be traceable to the early ignorance and distrust of psychic matters,[57] while in others they are imposed as line-drawing mechanisms designed to cut off liability.[58] In most cases, the limitations bear little rational relation to any legitimate reason for denying recovery and are therefore arbitrary.

The impact rule, which found much favor with the early

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informed woman that her husband was seriously injured in accident).

[55] *See* Dillon v. Legg, 68 Cal. 2d 728, 741-48, 441 P.2d 912, 921-25, 69 Cal. Rptr. 72, 81-85 (1968); Rodrigues v. State, 52 Hawaii 156, 173-74, 472 P.2d 509, 520 (1970); Homans v. Boston Elevated Ry., 180 Mass. 456, 457-58, 62 N.E. 737, 737 (1902); Okrina v. Midwestern Corp., 282 Minn. 400, 405-06, 165 N.W.2d 259, 263-64 (1969); Russ v. Western Union Tel. Co., 222 N.C. 504, 506, 23 S.E.2d 681, 682 (1943).

[56] *See infra* notes 57-68 and accompanying text.

[57] *See* Woodman v. Dever, 367 So. 2d 1061, 1062-63 (Fla. Dist. Ct. App. 1979); Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981). The *Woodman* court denied recovery for emotional distress sustained by a child who had witnessed the rape of her mother. *See* 367 So. 2d at 1062-63. The court indicated that there was no valid justification to retreat from the impact rule, reasoning that psychic injury could be easily feigned. *Id.* In an effort to guarantee the genuineness of the claim, the *Barnhill* court required that the plaintiff bystander actually fear that the victim would be seriously injured. *See* 300 N.W.2d at 108.

[58] *See* McGovern v. Piccolo, 33 Conn. Supp. 225, 229, 372 A.2d 989, 991 (1976); Tobin v. Grossman, 24 N.Y.2d 609, 615-18, 249 N.E.2d 419, 423-24, 301 N.Y.S.2d 554, 559-61 (1969). In *Tobin,* the plaintiff suffered mental distress after arriving at the scene of her child's injury. 34 N.Y.2d at 611, 249 N.E.2d at 419, 301 N.Y.S.2d at 554-55. In denying recovery, the court conceded that mental distress was foreseeable to the defendant, but rejected the foreseeability approach as an inadequate test that would subject the defendant to unlimited liability. *Id.* at 615-18, 249 N.E.2d at 422-24, 301 N.Y.S.2d at 558-61.

In *McGovern,* the plaintiff was denied recovery for mental distress caused by witnessing the death of her son. 33 Conn. Supp. at 226, 372 A.2d at 990. The court indicated that allowing recovery would raise serious policy questions in terms of exposing the defendant to virtually limitless liability. *Id.* at 229, 372 A.2d at 991.

courts, was an outgrowth of the parasitic damage approach, under which damages for psychic harm caused by negligence were allowed when appended to a claim of contemporaneous physical injury.[59] As courts began to realize that serious psychic disturbance might occur in the absence of serious physical disturbance, the rule evolved that damages for psychic harm were recoverable if accompanied by "physical impact."[60] In many cases the physical impact was minimal and bore little, if any, relation to the nature and extent of the psychic harm.[61] Thus, the rule was ineffective in aiding courts in disposing of trivial or unworthy claims. A number of courts, though recognizing the arbitrary nature of the impact rule and the importance of psychic equilibrium, nevertheless continued to apply this standard as a method for limiting liability until quite recently.[62] The absurd results and arbitrary nature of the impact rule have caused all but a few jurisdictions to abandon it.[63]

Although the majority of jurisdictions have rejected the impact requirement as arbitrary and unhelpful, courts have continued to search for some objective guarantee of the genuineness of the psychic harm. A number of jurisdictions have settled on a requirement that the psychic harm manifest itself physically.[64]

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[59] *See* Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 292-93, 23 S.W.2d 272, 275 (1929) (recovery permitted when physical impact requirement satisfied); Consolidated Traction Co. v. Lambertson, 59 N.J.L. 297, 302, 36 A. 100, 102 (N.J. Super. Ct. App. Div. 1896) (damages caused by fright recoverable when impact has occurred); Duty v. General Fin. Co., 154 Tex. 16, 20, 273 S.W.2d 64, 65-66 (1954) (physical harm essential to existence of tort of mental distress).

[60] *See* Van de Venter v. Chicago City Ry., 26 F. 32, 35 (C.C.N.D. Ill. 1885); Beaty v. Buckeye Fabric Finishing Co., 179 F. Supp. 688, 697 (E.D. Ark. 1959); Braun v. Craven, 175 Ill. 401, 420, 51 N.E. 657, 664 (1898).

[61] *See, e.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 582, 144 S.E.2d 680, 681 (1928) (circus horse excretion landing on plaintiff's lap); Porter v. Delaware Lackawanna W. R.R., 73 N.J.L. 405, 406, 63 A. 860, 860 (1906) (dust in eyes); Morton v. Stack, 122 Ohio St. 115, 115, 170 N.E. 869, 869 (1930) (inhalation of smoke).

[62] *See, e.g.*, Spade v. Lynn & Boston R.R., 168 Mass. 285, 287, 47 N.E. 88, 90 (1897), *overruled*, Dziokonski v. Babineau, 375 Mass. 555, 556, 380 N.E.2d 1295, 1296 (1978).

[63] *See, e.g.*, Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 551, 457 N.E.2d 1, 5 (1983); Bass v. Nooney Co., 646 S.W.2d 765, 771-72 (Mo. 1983)(en banc); Dziokonski v. Babineau, 375 Mass. 555, 559, 380 N.E.2d 1295, 1297-98, 1302 (1978); Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 35-36 (1961).

Among the jurisdictions retaining the impact rule are Florida, *see* Peacock v. General Motors Acceptance Corp., 432 So. 2d 142, 146 (Fla. Dist. Ct. App. 1983), Georgia, *see* Hamilton v. Powell, Goldstein, Frazer & Murphy, 252 Ga. 149, 151, 311 S.E.2d 818, 819 (1984), and Indiana, *see* Little v. Williamson, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982).

[64] *See, e.g.*, Payton v. Abbott Labs., 386 Mass. 540, 555, 437 N.E.2d 171, 181 (1982); Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 155 (Me. 1979).

Though the emphasis has shifted from physical harm that causes psychic injury to psychic harm that results in physical injury, the requirement of physical harm remains. Despite criticism charging that this approach provides an inadequate method for distinguishing between worthy and unworthy claims,[65] many American jurisdictions continue to apply it.[66] Although the physical harm requirement may arbitrarily exclude deserving claimants, it also functions to limit liability.

Another method used to limit liability and guarantee the genuineness of the claim is the requirement that the plaintiff be within the physical zone of danger created by the defendant's act.[67] Under this approach, if the defendant's negligent conduct creates an unreasonable risk of physical harm to the plaintiff, and the plaintiff suffers psychic harm as a direct result, the defendant is liable. According to its advocates, the zone of danger approach provides a guarantee that the claim of psychic harm is legitimate.[68] In addition, it acts as a liability-limiting device that assists courts in determining which plaintiffs should have their claims heard. Al-

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[65] *See, e.g.*, Paugh v. Hanks, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 765 (1983); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 922, 616 P.2d 813, 818, 167 Cal Rptr. 831, 836 (1980).

[66] *See, e.g.*, Bullard v. Central Vt. Ry., 565 F.2d 193, 197 (1st Cir. 1977); Martinez v. Teague, 96 N.M. 446, 452, 631 P.2d 1314, 1320 (1981); Judd v. Rawley's Cherry Hill Orchards, Inc., 611 P.2d 1216, 1221 (Utah 1980).

[67] *See* Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 551, 457 N.E.2d 1, 5 (1983); Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980); Bovsun v. Sanperi, 61 N.Y.2d 219, 228-29, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984); *see also* RESTATEMENT (SECOND) OF TORTS § 436 (1965). The zone of danger rule is viewed as the majority rule in the country today. *See Bovsun*, 61 N.Y.2d at 228 & n.6, 461 N.E.2d at 847 & n.6, 437 N.Y.S.2d at 361 & n.6. Under this rule, a person within the zone of physical danger, who because of the negligence of the defendant, fears for his own well-being, has a cause of action for physical harm resulting from emotional distress. *See* Rickey v. Chicago Transit Auth., 98 Ill. 2d at 555, 457 N.E.2d at 5.

Courts are consistent in recognizing the need for a limitation on psychic harm liability. In *Stadler*, the Minnesota Supreme Court found the zone of danger limitation to be the most consistent and convenient limitation. *See* 295 N.W.2d at 554.

New York courts have taken a slightly different view, basing the adoption of the rule on traditional negligence concepts. *See Bovsun*, 61 N.Y.2d at 229, 461 N.E.2d at 847, 473 N.Y.S.2d at 361. The court in *Bovsun* stated "that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages sustained including those occasioned by witnessing the suffering of an immediate family member who is also injured by the defendant's conduct." *Id.*

[68] *See* Stadler v. Cross, 295 N.W.2d 553, 554 (Minn. 1980); Bovsun v. Sanperi, 61 N.Y.2d 219, 228-29, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984); Niederman v. Brodsky, 436 Pa. 401, 413, 261 A.2d 84, 90 (1970); *see also* Comment, *Negligent Infliction of Emotional Distress: Liability to the Bystander — Recent Developments*, 30 MERCER L. REV. 735, 737 (1979).

though the zone of danger rule is perhaps a slightly more realistic method of dealing with recovery for psychic harm, the rule is actually another arbitrary line-drawing device.

The drawbacks of the zone of danger rule become strikingly apparent in the "bystander" context in which the plaintiff claims psychic harm caused not from fear of injury to himself, but from observing injury to a loved one, usually a close relative. Although the zone of danger might have some function in guaranteeing the genuineness of a claim of fright for the plaintiff's own safety, it clearly bears no relation at all to the kind of psychic harm suffered as a consequence of witnessing injury to another. Whether one was or was not within the zone of danger is irrelevant to the trauma of seeing one's child run down by a negligently driven automobile. The Supreme Court of California, in *Dillon v. Legg*,[69] was the first American court to allow a bystander, outside the zone of danger, to recover for negligently inflicted emotional distress. In rejecting the zone of danger rule, the *Dillon* court purported to apply "general rules of tort law, including the concepts of negligence, proximate cause, and foreseeability."[70] However, the decision resulted merely in a series of foreseeability requirements:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
> (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observation of the accident, as contrasted with learning of the accident from others after its occurrence.
> (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[71]

Although these factors are relevant to a foreseeability inquiry, they have hardened into another set of rules which, though more favorable to plaintiffs, are no less arbitrary in application than the impact rule, the zone of danger rule, or a rule simply denying recovery to bystanders.[72]

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[69] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[70] *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

[71] *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[72] A recent case from the California Supreme Court indicates that the court does not view the *Dillon* foreseeability factors as requirements, but rather as guidelines. In Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985), a mother who witnessed the deterioration of her sick child over a period of days, but who was not present

Since the *Dillon* decision, several jurisdictions have followed suit, and at this point a growing minority of states have extended recovery for negligent infliction of emotional distress to plaintiff bystanders outside of the zone of danger.[73] The majority of these jurisdictions however, still require a showing of physical injury and have either used the *Dillon* foreseeability factors or have devised their own sets of rules.[74]

Several jurisdictions recently have abandoned arbitrary limitations on recovery and have recognized a distinct cause of action for the negligent infliction of emotional distress.[75] These jurisdictions have specifically recognized that, in light of the advances in psychiatric medicine, proof of physical injury is not essential to establish-

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when he died, stated a claim for emotional distress in spite of the fact that there was no contemporaneous observation of a sudden traumatic event. *Id.* at 161-64, 703 P.2d at 3-6, 216 Cal. Rptr. at 663-66. The court also concluded, however, that the child's father, who merely heard about the child's suffering from the child's mother, could not recover. *Id.* at 163 n.6, 703 P.2d at 5 n.6, 216 Cal. Rptr. at 665 n.6.

[73] To date, at least fifteen jurisdictions have adopted either the *Dillon* approach or some variation of it. *See, e.g.*, Leong v. Takasaki, 55 Hawaii 398, 404, 520 P.2d 758, 764 (1974); Barnhill v. Davis, 300 N.W.2d 104, 107 (Iowa 1981); Culbert v. Sampson's Supermarkets, 444 A.2d 433, 436 (Me. 1982); Dziokonski v. Babineau, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978); Toms v. McConnell, 45 Mich. App. 647, 654, 207 N.W.2d 140, 145 (1973); Entex, Inc. v. McGuire, 414 So. 2d 437, 444 (Miss. 1982); Corso v. Merrill, 119 N.H. 647, 653, 406 A.2d 300, 306 (1979); Portee v. Jaffee, 84 N.J. 88, 98-99, 417 A.2d 521, 526-27 (1980); Ramirez v. Armstrong, 100 N.M. 538, 539, 673 P.2d 822, 823 (1983); Paugh v. Hanks, 6 Ohio St. 3d 72, 76, 451 N.E.2d 759, 762 (1983); Sinn v. Burds, 486 Pa. 146, 149, 404 A.2d 672, 674 (1979); D'Ambra v. United States, 114 R.I. 643, 652, 338 A.2d 524, 531 (1975); Apache Ready Mix Co. v. Creed, 653 S.W.2d 79, 82 (Tex. Civ. App. 1983); Hunsley v. Glard, 87 Wash. 2d 424, 428, 553 P.2d 1096, 1099 (1976). However, other jurisdictions have refused to adopt the *Dillon* approach. Some have applied the "zone of danger" rule, *see, e.g.*, Rickey v. Chicago Transit Auth. 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 598-99 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980); Bovsun v. Sanperi, 61 N.Y.2d 219, 230-31, 461 N.E.2d 843, 848-49, 472 N.Y.S.2d 357, 361 (1984); while others have continued to adhere to the "impact" rule, *see, e.g.*, Peacock v. General Motors Acceptance Corp., 432 So. 2d 142, 146 (Fla. Dist. Ct. App. 1983); Hamilton v. Powell, Goldstein, Frazer & Murphy, 252 Ga. 149, 150, 311 S.E.2d 818, 820 (1984); Little v. Williamson, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982).

[74] *See, e.g.*, Barnhill v. Davis, 300 N.W.2d 104, 108 (Iowa 1981) (foreseeability approach considered seriousness of emotional distress inflicted on a reasonable person); Dziokonski v. Babineau, 375 Mass. 555, 568-69, 380 N.E.2d 1295, 1302 (1978) (plaintiff must have either experienced accident personally or have come upon scene of accident soon after occurrence); *see also* Keck v. Jackson, 122 Ariz. 114, 115, 593 P.2d 668, 669 (1979) (dual test applying both zone of harm and physical manifestation of psychic harm).

[75] *See, e.g.*, Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369, 374 (Ala. 1981); Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 923, 616 P.2d 813, 826, 167 Cal. Rptr. 831, 837 (1980); Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 520 (1970); Paugh v. Hanks, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 765 (1983); Sinn v. Burd, 486 Pa. 146, 172-73, 404 A.2d 672, 686 (1979).

ing the validity of a claim for psychic harm.[76] Indeed, many have concluded that proof of physical injury may not always be a good indication of the severity of the harm suffered.[77]

Although these courts have focused primarily on the appropriateness of applying traditional negligence theory to deal with problems of unlimited liability, they also have recognized the problems inherent in permitting recovery for psychic harm. In an effort to define and limit liability, and to forestall the possibility of an abundance of trivial claims, these courts have imposed three requirements: (1) that the harm be serious; (2) that the incident giving rise to the harm be sufficient to cause serious psychic harm in a person "normally constituted"; and (3) that the harm be a reasonably foreseeable result of the tortious activity.[78] Obviously, the first and second requirements are not part of traditional negligence theory. However, as will be shown in a later section of this Article, they address legitimate concerns and serve to limit liability in a rational, rather than arbitrary manner, and are therefore, preferable to a zone of danger or physical injury approach.[79]

Although the jurisdictions recognizing a "no strings attached" cause of action for negligent infliction of emotional distress have

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[76] *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 927-28, 616 P.2d 813, 820-21, 167 Cal. Rptr. 831, 838 (1980); Rodrigues v. State, 52 Hawaii 156, 172, 472 P.2d 509, 519-21 (1970); Sinn v. Burd, 486 Pa. 146, 154, 404 A.2d 672, 676 (1979).

[77] *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 927-28, 616 P.2d 813, 820, 167 Cal. Rptr. 831, 838 (1980). In *Molien*, the plaintiff's wife was negligently examined by one of the defendant's staff physicians and subsequently diagnosed as having an infectious strain of syphilis. *Id.* at 919, 616 P.2d at 814, 167 Cal. Rptr. at 832. As a result, she became suspicious that her husband had engaged in extra-marital affairs, which led to rising marital tensions and an ultimate end to the marriage. *Id.* at 920, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33. Mr. Molien brought suit against the defendant, alleging that the staff physician's tortious conduct was directed at him as well as at his wife. *Id.*, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33. The issue before the court was whether the plaintiff was barred from recovery for the mental distress suffered because there was no corresponding physical injury. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

The *Molien* court noted that the border between physical and emotional injury could not easily be delineated, and that the question of injury, physical or emotional, was merely one of proof that should be left to the trier of fact. *Id.* at 929-30, 616 P.2d at 820-21, 167 Cal. Rptr. at 838-39. In addition, the court held that advances in modern psychology would both enable the factfinder to establish with greater certainty the genuineness of emotional injury and prevent the institution of a multitude of frivolous claims. *Id.* at 930, 616 P.2d at 821, 167 Cal. Rptr. at 839.

[78] *See* Rodrigues v. State, 52 Hawaii 156, 170-75, 472 P.2d 509, 519-21 (1970); Paugh v. Hanks, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 765-66 (1983); Sinn v. Burd, 486 Pa. 146, 173, 404 A.2d 672, 686 (1979).

[79] *See infra* notes 133 to 159 and accompanying text.

brought the interest in psychic equilibrium much closer to independence, it is clear that recognition of a cause of action is still dependent on a showing that the invasion was the result of negligence.[80] Thus, the focus is often on the applicability of *negligence* principles in solving problems of over-extended liability. There is little indication in these cases that the interest has gained independence to the point that it would be protected regardless of the theory of the plaintiff's case.

4. Recovery for Psychic Harm in Traditional Strict Liability

Most judicial and scholarly attention given the interest in psychic equilibrium has occurred in the context of negligence or intentional tort. However, there are other avenues to explore. Whether courts have awarded damages for psychic harm in traditional strict liability cases is a relevant inquiry in determining whether strict liability in tort should be imposed for psychic harm in a modern products liability case. Although an affirmative finding does not necessarily mean that such awards are appropriate in a strict products liability context, it does provide some support for the proposition that recovery for psychic harm is not alien to a strict liability theory.

Until the recent explosion in products liability, tort recoveries based on a theory of strict liability had been limited to a few clearly defined areas. These include liability for personal injuries or property damage caused by wild or vicious animals, by ultrahazardous activities, or through tortious breach of implied warranty.[81] Although traditional strict liability theory has only rarely been applied to psychic injuries, there is some indication that damages for fright caused by vicious or wild animals may be recovered in the absence of physical injury.[82] Similarly, cases in which courts

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[80] *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 927-28, 616 P.2d 813, 819-20, 167 Cal. Rptr. 831, 837-38 (1980); Rodrigues v. State, 52 Hawaii 156, 170, 472 P.2d 509, 519 (1970).

[81] *See* F. HARPER & F. JAMES, THE LAW OF TORTS § 14.1 (1956); W. PROSSER & W. KEETON, *supra* note 8, § 75.

[82] *See* Candler v. Smith, 50 Ga. App. 667, 673, 179 S.E. 395, 399 (1935); Netusil v. Novak, 120 Neb. 751, 754, 235 N.W. 335, 337 (1931). In *Netusil,* the court held that a defendant who knew of his dog's propensity for viciousness was strictly liable for the plaintiff's nervous prostration caused when the dog attacked her, even though she suffered no physical injury. 120 Neb. at 755, 235 N.W. at 337. In *Candler,* the plaintiff was allowed to recover for nervous shock caused by the defendant's wild baboon, which had escaped from the defendant's yard. 50 Ga. App. at 672-73, 179 S.E. at 398-99. The *Candler* court noted, however,

have imposed strict liability for conducting an ultrahazardous activity (usually blasting) offer some authority for the proposition that damages for psychic harm are recoverable in strict liability.[83] Such damages have also been awarded in contaminated food cases, when the plaintiff has claimed tortious breach of implied warranty.[84] Although these cases themselves do not justify full-scale protection of the interest in psychic equilibrium in a strict liability context, they do indicate that some courts are willing to protect the interest in such a setting.

D. *Conclusion: A Plea for Independence*

It is clear from the foregoing that despite the progress that the interest in psychic equilibrium has made in attaining recognition, it continues to be tied to the moral culpability of the defendant. To make moral culpability a prerequisite to recovery, however, appears to question the importance of the interest itself rather than the need to assure the validity of the claim.[85] To tie awards for psychic harm to the degree of the defendant's culpability overlooks the inescapable fact that the nature and extent of the defendant's fault bears no relationship whatsoever to the nature and extent of the plaintiff's harm. If an interest is recognized as worthy of protection, the emphasis should be on the nature and extent of the harm to the plaintiff, not on either the theory of recovery or the character of the defendant's tortious behavior. Thus, if a societal interest is advanced by holding the defendant "accountable" for the plaintiff's psychic harm, the plaintiff should recover regardless of whether the defendant may be deemed "culpable."

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that, as a general rule, psychic injury, to be recoverable, must be accompanied by some physical manifestation. *Id.* at 673, 179 S.E. at 399.

[83] *See* Alonso v. Hills, 95 Cal. App. 2d 778, 789, 214 P.2d 50, 58 (1950); Gulatt v. Ashland Oil & Ref. Co., 243 So. 2d 820, 827 (La. Ct. App. 1971); Halpert v. Ingram & Greene, Inc., 70 Misc. 2d 872, 873, 333 N.Y.S.2d 913, 914 (N.Y.C. Civ. Ct. N.Y. County 1972).

[84] *See, e.g.*, Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 443, 420 P.2d 855, 859 (1967).

[85] Tort law often accounts for "moral culpability" in determining damages by allowing awards of punitive damages when the defendant's behavior has been particularly egregious. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1265 (1976). However, an important goal of tort law is to provide compensation for those whose legally protected interests have been invaded by another's socially unacceptable behavior. *See* W. PROSSER & W. KEETON, *supra* note 8, at 5-6.

III. Recovery for Psychic Harm Under a Theory of Strict Products Liability

Once the value of the interest in psychic equilibrium is accepted as independent and unattached to a particular theory of action, it should be afforded full protection, unless serious obstacles exist. In strict products liability, the potentially serious obstacles are the recurring problems of unlimited liability and the potential strain on the judicial system. The appropriate method for defining the extent of liability in strict products liability has been a controversial subject even when psychic harm has not been an issue.[86] The addition of a psychic harm dimension further complicates this already confused area.

A. *History and Background*

The explosion of products liability and its overnight transition from a negligence and warranty cause of action to a claim covered by an independent legal theory has been so well documented, and so often discussed, that another account would be redundant.[87] Some aspects of its development, however, are relevant to the issue under consideration here and require at least cursory examination. In particular, a look at the various social policy rationales used to justify imposition of strict liability may be relevant to determining whether recovery of damages for psychic harm is appropriate in strict products liability. Further, it may be helpful to focus on the nature of strict products liability to decide which method of limiting liability is appropriate. It is sufficient for present purposes to note that Justice Traynor's bold assertion in *Greenman v. Yuba Power Products*,[88] that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that

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[86] *See* Maleson, *supra* note 8, at 16-17. Courts have tended to use the familiar concept of foreseeability to limit liability in strict products liability, but this propensity has been sharply criticized. *See* Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law*, 8 Rutgers L.J. 101, 113 (1976).

[87] *See, e.g.*, W. Prosser & W. Keeton, *supra* note 8, at §§ 95A-99; Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 Stan. L. Rev. 974, 975-90 (1966); Prosser, *supra* note 6, at 791-805; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1099-1103, 1124-34 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363, 363-79 (1965); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 825-27 (1973).

[88] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

causes injury to a human being,"[89] was endorsed by the American Law Institute in its adoption of Section 402A of the Restatement (Second) of Torts.[90] Subsequently, the vast majority of American jurisdictions has embraced some form of strict liability in tort for injuries caused by defective products.[91] The problems of defining the scope of strict products liability and the vast increase in product-related litigation in the last two decades have been a source of consternation and considerable concern to courts[92] and commentators[93] alike. Indeed, widespread dissatisfaction with the way strict products liability has functioned in actual practice has led to a reassessment of whether strict liability should be imposed at all in design defect and "duty to warn" cases.[94]

The current debate over whether strict liability should be imposed in products cases, although certainly relevant in any discussion of strict products liability, is not precisely within the scope of this Article. However, it is essential at the outset of this discussion to distinguish between the need to reevaluate products liability and the need to protect the interest in psychic equilibrium. There is a danger that concern over extension of strict liability in the products liability area will result in a backlash against the physically harmed plaintiff. Thus, if the boundaries of strict products liability need to be delineated more clearly, then these boundaries should be reexamined and redefined. The problems with respect to products liability will not be rationally or appropriately solved by

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[89] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[90] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[91] *See supra* notes 6-8 and accompanying text.

[92] *See, e.g.*, Helene Curtis Indus. v. Pruitt, 385 F.2d 841, 849 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968).

[93] *See, e.g.*, Birnbaum, *Legislative Reform or Retreat? A Response to the Product Liability Crisis*, 14 FORUM 251, 252-53 (1978) (increases in number of cases and size of awards created "crisis" in field of products liability); Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 643 (1978) (doctrinal changes have been source of both enthusiasm and confusion); Henderson, *Judicial Review of Manufacturer's Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1531 (1973) (courts incapable of setting necessary standards for product safety); Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 301 (1976) (confusion and inconsistency among courts interpreting strict liability doctrine).

[94] *See, e.g.*, U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT VII-19 to VII-20 (1977) (application of strict liability to "design" and "duty to warn" cases is unsound); Uniform Product Liability Act, 44 Fed. Reg. 62,714 (1979) (strict liability should not apply to "design" and "duty to warn" cases); Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625, 634-35 (1978) (proposal to eliminate strict liability in "design" cases).

singling out and denying recovery to a plaintiff who has suffered a serious injury to an important interest.

B. *Policies Underlying Strict Products Liability and Recoveries for Psychic Harm*

The recognition of psychic equilibrium as an interest worthy of independent protection does not necessarily transform manufacturers into insurers of consumers' psychic equilibrium. When a psychic injury occurs, there may be a number of reasons for not imposing liability—the injury may be purely accidental, so that no reason can be found for shifting the loss away from the injured party, or the plaintiff's interest in being free from psychic harm may be outweighed by policies favoring the defendant's interests in being free of liability. Under a negligence theory, imposition of liability is justified, to a large extent, by the collective sentiment of society that the defendant's substandard behavior is culpable.[95] If, for reasons of sound social policy, society has deemed that liability for the creation of certain kinds of risks should be imposed even if the plaintiff cannot make a showing of "fault" in the traditional sense, it is necessary to establish that those social policies are advanced by the imposition of liability. Therefore, to determine whether the interest in psychic equilibrium should be protected in strict products liability, it is necessary, first, to identify the policy rationales that have been propounded as justification for imposing strict products liability, and, second, to determine whether recovery for psychic harm comports with those policies.

The policies underlying the imposition of strict liability in tort for product-related injuries have been variously stated,[96] restated,[97]

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[95] F. HARPER & F. JAMES, THE LAW OF TORTS § 16.1 (1965); W. PROSSER & W. KEETON, *supra* note 8, § 31, at 169.

[96] *See, e.g.*, Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962) (products liability insures that costs of injuries resulting from defective products are borne by manufacturer); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) (public policy demands responsibility for injuries be fixed wherever it most effectively reduces number of defective products); RESTATEMENT (SECOND) OF TORTS § 402A and comment c (1965) (public policy demands that burden of accidental injuries caused by defective product be placed on seller).

[97] *See, e.g.*, Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1086-92 (1965) (producers who throw risk of loss on others shall pay for loss incurred); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 809-10 (1976) (compensation of inadequately protected consumer for injuries caused by defective product is cost of doing business); Wade, *supra* note 87, at 826 (product safety increased where manufacturer held liable for

and rethought.[98] Although numerous formulations of these rationales are possible, the following statement of policies fairly characterizes those traditionally advanced as justifying imposition of strict products liability:

> (1) Manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community.
> (2) Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of products which must be "consumed" in order to function in modern society.
> (3) Sellers are often in a better position than consumers to identify the potential product risks, to determine the acceptable levels of such risks, and to confine the risks within those levels.
> (4) A majority of product accidents not caused by product abuse are probably attributable to the negligent acts or omissions of manufacturers at some stage of the manufacturing or marketing process, yet the difficulties of discovering and proving this negligence are often practicably insurmountable.
> (5) Negligence liability is generally insufficient to induce manufacturers to market adequately safe products.
> (6) Sellers almost invariably are in a better position than consumers to absorb or spread the costs of product accidents.
> (7) The costs of injuries flowing from typical risks inherent in products can fairly be put upon the enterprises marketing the products as a cost of their doing business, thus assuring that these enterprises will fully "pay their way" in the society from which they derive their profits.[99]

With the caveat that these rationales may have shortcomings,[100] this Article will proceed on the assumption that these social policy rationales remain the legitimate foundation underlying

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defects).

[98] *See* Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 683-84 (1980).

[99] *See* Montgomery & Owen, *supra* note 97, at 809-10.

[100] *See* Epstein, *supra* note 93, at 658-60; Owen, *supra* note 98, at 703-14. Implicit in the restatement of these rationales is an assumption that they accurately and adequately express the policies that provide a foundation for the premise that imposition of strict tort liability is appropriate in products liability cases. However the legitimacy of this assumption and the effectiveness of traditional rationales as decisionmaking tools for courts in the products liability area recently have been seriously questioned. *See* Epstein, *supra* note 93, at 658-60; *Owen, supra* note 98, at 703-14. However, no clearly defined substitute rationale has been recognized, and these are the policies with which courts are still working.

strict products liability. The primary focus of this Article will be on the relationship of each policy rationale to recoveries for psychic harm, and whether such recoveries serve (or at least do not disserve) the expressed policies. The conclusion is, if each rationale is generally sound, it is no less sound as applied specifically to recoveries for psychic harm.

The first rationale may be termed either the implied representation of safety or the consumer expectation policy for imposing strict liability.[101] Obviously, a product which the manufacturer has implied is safe, and which the consumer expects to be safe, is not safe if it is defective and causes harm. Whether that harm is psychic or otherwise is irrelevant to the issue of whether the manufacturer has raised an expectation of product safety in the consumer. The general sense of product quality that the manufacturer conveys and that the consumer expects, exists regardless of the nature of the untoward consequence. The question is what protection the law will afford a consumer injured by the defective product. This question is not answered by inquiring whether the consumer expected only some of his interests to be free from invasion by a defect in the product. It is sufficient to say that the consumer expected the product to be safe because the manufacturer implied it was safe. If it caused harm, either physical or psychic, it was not safe.

The second rationale expresses the sentiment that strict products liability is justified by the vast proliferation of products and the consumer's resulting inability to inspect them or protect himself against them. As with the first rationale, the nature of the harm is irrelevant to the issue of whether this is a legitimate reason for imposing strict liability. Just as an extremely complicated machine can run amuck and cause physical injury, it can run amuck and put one in fear of suffering such injury. That it was the latter and not the former harm that actually occurred in a particular case has no bearing on whether consumers are unable to protect themselves from the vast array of complicated products that exists today.

The third rationale focuses on the superior resources and expertise for risk identification that manufacturers potentially pos-

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[101] *See* Owen, *supra* note 98, at 707. For a detailed discussion of the representational theory, see Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

sess. Whether recovery for psychic harm comports with this policy depends upon how narrowly or broadly the risk to be identified and assessed by the seller is defined. If identifying the risk means that the defendant must be in a position to realize that a particular product defect will cause psychic harm, recovery for such harm may not comport with this policy because psychic harm may not be the kind of injury that would ordinarily result from an accident involving the product. On the other hand, if identifying the risk merely means that manufacturers should realize that a defect in the product can cause an invasion of a legally protected interest, then the character of the actual harm that results—whether physical or psychic—should be irrelevant. Thus, with this rationale, the real question is how to define the scope of liability in strict products liability. From a policy standpoint, regardless of the definition of risk, it appears that the manufacturer is generally in a better position than the consumer to control the risk and, under this approach, should be responsible for any harm caused by the product. Risk management is directed toward eliminating generalized risk of injury or managing those that cannot be eliminated. If liability is not imposed for psychic harm under this rationale, it is not because the manufacturer is not in a better position than the consumer to recognize and manage the risk through quality control; it is because other policy considerations have been employed to force the conclusion that the manufacturer should not be liable for psychic harm.

If the premise of the fourth policy—that most product accidents are a result of the manufacturer's negligence—is generally sound, there is no reason to deny recovery for psychic harm. Under such a theory, since strict products liability would simply be manufacturer negligence that the plaintiff did not have to prove, the same justifications for allowing awards for psychic harm in a negligence cause of action would apply.

The fifth rationale emphasizes the deterrent effect that imposition of strict products liability will have on manufacturers. This approach suggests that the desired goal of strict products liability is to create an incentive to manufacturers to produce safe products, a goal that is in no way furthered by excluding damages for psychic injury. If the unsafe character of a product causes serious psychic harm, it is just as unsafe as if it had caused bodily harm. Thus, awards for psychic harm would serve as an inducement to create safe products.

The sixth justification assumes that suppliers of products are better equipped than consumers to absorb or spread losses. If this assumption is well founded, the manufacturer should pay for the product-related loss regardless of its character. A problem with this assumption that may bear upon recoveries for psychic harm is that a manufacturer who is currently better able than a consumer to absorb or insure against loss may not be in such a position for long if he must pay for every product-related injury, no matter how remotely connected to the product. A requirement of bodily injury has some built-in liability limitations simply because the injurious effects of a defective product can spread only so far. However, the spectre of a defective product malfunctioning in such a way as to cause psychic damage to a television viewing audience of millions looms large in the minds of those who would deny recovery. What is called for here, however, is not the rejection of all claims of psychic injury, but rather a workable method for limiting liability, once it is established that good reason for limiting liability exists.

The seventh justification states an enterprise liability approach to strict products liability and calls for an economic analysis. Stated in simple terms, the losses to society created by an enterprise should, for economic reasons, be borne by that enterprise. Given the natural desire to allocate limited resources efficiently, and the need to know the true cost of everything in the marketplace, the cost of potential injuries will be included in the price for which products are sold. According to an enterprise liability theory, if the product caused the injury, the loss should be sustained by the manufacturer.[102] The resulting cost may then be added to the price of the product, and the selling price will more accurately reflect its true cost.[103] If the cost is too high, it will exceed the amount consumers are willing to pay, and the law of supply and demand will provide a check on further increases. In order for an enterprise liability theory to work, however, the costs should be actual costs—out of pocket expenses for doctors, medication, hospitalization, and lost wages. Since a refusal to permit a recovery for psychic harm would subvert an enterprise liability approach to

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[102] For discussion of enterprise liability and economic approach to tort liability, *see generally* Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1056-57 (1972); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 175-229 (1976).

[103] *See* W. PROSSER & W. KEETON, *supra* note 8, § 98, at 692-93.

strict products liability, psychic harm should be compensable under enterprise liability if it results in actual monetary losses to the plaintiff.

Naturally enough, the policies justifying strict products liability in situations that previously would have required a showing of negligence bespeak a distinct leniency toward consumers seeking redress for product-related injuries. Though these policies in no way indicate a need to deny recovery for psychic harm, discerning in them a desire to protect the American consumer by providing more expansive avenues for recovery only begins the inquiry.

C. *Defining the Scope of Liability for Psychic Harm in Strict Products Liability*

Courts will not be convinced that the interest in psychic equilibrium should be protected in strict products liability cases without some assurance that the extent of liability can be defined in a way that avoids imposition of unfair burdens on manufacturers. As the interest in psychic equilibrium has evolved toward independent recognition, a primary concern of the courts has been the problem of indefinite and potentially unlimited liability.[104] This section of the Article will address the problem of defining the scope of liability in a strict products liability setting with the aim of establishing that, with an appropriate liability-limiting device, courts will be able to protect the interest in psychic equilibrium invaded by a defective product.

Much of the difficulty with the area of strict products liability in general, and with finding a workable liability defining device in particular, result from section 402A of the Restatement (Second) of Torts and its commentary. The adoption of section 402A by the American Law Institute marked a distinct doctrinal shift in the approach to product injury cases.[105] The focus of attention shifted from the conduct that had brought about an unreasonably dangerous condition (defendant's negligence), to the defective condition of the product, which made it unreasonably dangerous to the user or consumer (section 402A Liability). Although section 402A does not specifically label the brand of liability it created, comment "a"

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[104] *See, e.g., supra* notes 35-39 and accompanying text; Tobin v. Grossman, 24 N.Y.2d 609, 615-16, 249 N.E.2d 419, 422-23, 301 N.Y.S.2d 554, 558-59 (1969).

[105] *See supra* notes 6-8 and accompanying text.

states unequivocally that "[t]he rule is one of strict liability."[106]

The use of the phrase "unreasonably dangerous" to modify the term "defect," however, demonstrates that the language of section 402A sounds in both negligence and strict liability.[107] Moreover, though much of the commentary stresses the strict and enterprise liability aspects of section 402A, the standard stated in comment "j," relating to the necessity for directions or warnings, is clearly a negligence standard.[108] In addition, the smorgasbord approach to the policies underlying strict products liability[109] exacerbates the sense of doctrinal mystery that surrounds this section. Provided with these conflicting standards, and with little else to guide them, the courts began the difficult task of applying the newly created doctrine to individual cases arising before them. It is not surprising that courts, unsure of which doctrine to apply, have relied on the

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[106] *See* RESTATEMENT (SECOND) OF TORTS § 402A comment a (1965). Comment a provides in pertinent part:

> a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

Id.

[107] *Id.* § 402A(1).

[108] *Id.* § 402A comment j;

> . . . Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

Id. comment i.

[109] *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 63-64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461-62, 150 P.2d 436, 440-41 (1944); RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

In *Greenman*, the plaintiff was injured while operating a power tool manufactured by the defendant. 59 Cal. 2d at 59, 377 P.2d at 896, 27 Cal. Rptr. at 698. The court held the manufacturer strictly liable for the plaintiff's injuries since the manufacturer knew that the product was to be used without having first been inspected for defects. *Id.* at 62-63, 377 P.2d at 900-01, 27 Cal. Rptr. at 700-01.

In *Escola*, however, the manufacturer of a defective soda bottle was held liable, not under a strict liability theory, but under a theory of negligence. 24 Cal. 2d at 461-62, 150 P.2d at 440.

familiar vernacular of negligence law, and, in particular, on the concept of foreseeability.[110] It has been suggested however, that although foreseeability is an appropriate and effective method for limiting liability in negligence cases, it may be doctrinally inconsistent with the strict liability aspects of products liability.[111] In negligence, the concept of foreseeability is directly tied to the notion of the defendant's culpability. A defendant is liable for only those harms caused by his conduct which he should have foreseen. Strict products liability is imposed however, not because the defendant's conduct was substandard, but because society has concluded that the furtherance of certain policies justifies the imposition of liability without regard to fault. Therefore, the use of foreseeability as a method for limiting liability has no integral place in a case based on strict liability. It cannot be denied that the section 402A brand of strict products liability has strong negligence overtones, but much doctrinal confusion could be avoided by using liability defining devices that are not directly tied to a particular legal theory.

Although the doctrinal and policy underpinnings of strict products liability are many and varied, a common thread running through all the articulated policies is that the time has come for those marketing defective products to assume responsibility for injuries caused by such products. As the commentary to section 402A states, "the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products."[112] If "maximum protection" means protection for all independently cognizable interests of consumers who have been harmed by a defective product, psychic harm is within the formula. If this expansive view is accepted at face value however, questions such as "what kind of harm?" and "suffered by whom?" are still legitimate and quite pressing in individual cases. Any device used to define liability must be one that will extend liability in a manner that would both serve the expansive purpose of strict products liability and protect the interest in psychic equilibrium. Any limits imposed on liability

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[110] *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 737 F.2d 462, 465-66 (5th Cir. 1984) (injured party need show only that injury would be reasonably foreseeable to one knowing of defect in product); Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1536 (D.C. Cir.) (manufacturer has duty to warn of foreseeable dangers), *cert. denied*, 105 S. Ct. 545 (1984).

[111] RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

[112] *See* Maleson, *supra* note 8, at 11-12.

must be definite enough to permit a sufficiently wide range of choice of action so that manufacturers can engage in profitable enterprise without potentially disastrous liability. At the same time, these restrictions must permit consumers injured by defective products to have a fairly clear idea of when to seek compensatory relief from the manufacturer.

1. Risk Analysis

One possible way to limit appropriately liability is to employ a generalized risk analysis adapted to the context of strict products liability. Risk analysis has been exhaustively explored and extensively extolled as a method for defining the scope of liability in tort cases.[113] Proponents of risk analysis have advanced it as an alternative to "proximate cause" in negligence law [114] and as a tool for determining the extent of liability in both traditional strict liability [115] and strict products liability cases. [116]

There are a number of variations on the theme of risk analysis, but its basic premise is that "the scope of liability should be commensurate with the basis of liability."[117] In negligence, the basis of liability is substandard conduct,[118] in traditional strict liability, it is the creation of a risk through the performance of a particularly dangerous activity,[119] and in strict products liability it is the dissemination of a dangerously defective product.[120] Because each of these involves the creation of a risk that will result in liability if

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[113] *See, e.g.*, R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Birnbaum, *Unmasking the Test for Design Defect: From Negligence to Warranty to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 602-18 (1980); Epstein, *supra* note 93, at 650-62; Seavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COLUM. L. REV. 20, 29-41 (1939); Note, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1031 (1928).

[114] *See* R. KEETON, *supra* note 113, at 17, 127 n.16; Smith, *supra* note 20, at 265-67; Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 22-33.

[115] *See, e.g.*, R. KEETON, *supra* note 113, at 103-08; Birnbaum, *supra* note 113, at 631-36; Donaher, Piehler, Twerski & Weinstein, *The Technological Expert in Products Liability Litigation*, 52 TEX. L. REV. 1303, 1307-09 (1974); Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 355-57 (1980).

[116] R. KEETON, *supra* note 113; at 108-15. Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1189 (1976); Maleson, *supra* note 8, at 16-20.

[117] R. KEETON, *supra* note 113, at 19.

[118] *See* W. PROSSER & W. KEETON, *supra* note 8, § 43, at 297.

[119] *See id.* § 75, at 537.

[120] *See id.* § 95, at 677-79.

injury occurs, risk analysis is theoretically applicable to all three.

Although legal scholars have long praised risk analysis as a workable method for determining tort liability,[121] it has not been widely used by courts.[122] In the context of strict products liability this factor may enhance its applicability because, unlike the notion of foreseeability, it has not been closely identified with any particular area of tort law. Thus, it is less likely that negligence-based reasoning will invade the court's holding and engender the doctrinal confusion that has been a major concern of commentators.[123] Rather than focusing on the defendant's behavior, risk analysis examines the risk created, the harm suffered, and the fairness of holding the risk creator liable.[124]

The critical question is how risk analysis would operate in a strict products liability case in which the plaintiff suffered psychic harm. A controversial area in risk analysis generally is the question of whether it should be the judge or the jury who decides if a particular result was within the scope of the risk created.[125] Those who favor having the judge decide stress that the policy aspects involved lead to a determination of whether there was a duty, which is traditionally a judicial function.[126] Those favoring the jury

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[121] *See* R. KEETON, *supra* note 113, at 18-19; Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 159-60 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 544 (1972).

[122] *See* Maleson, *supra* note 8, at 18; Page, *Generic Products Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 874 (1983). Professor Page suggests that courts have rejected risk analysis because they are hesitant to adopt radical changes and are of the opinion that the matter requires legislative action. *Id.* A notable exception is Justice Cardozo's opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[123] *See* Maleson, *supra* note 8, at 18 (risk analysis avoids ambiguity by focusing on court's definitions of duty and risk).

[124] *See id.* Risk analysis involves a determination of whether the risk is unreasonable by balancing the probability and seriousness of harm against the expense of safety precautions. *See* Raney v. Honeywell, Inc., 540 F.2d 932, 935 (8th Cir. 1976); Welch v. Outboard Marine Corp., 481 F.2d 252, 254-55 (5th Cir. 1973); Phillips v. Kimwood Mach. Co., 269 Or. 485, 492-93, 525 P.2d 1033, 1036-37 (1974). This type of determination permits an objective evaluation of the costs and benefits imposed on society by production of the product. *See* Montgomery & Owen, *supra* note 97, at 844.

[125] *See, e.g.*, Henderson, *supra* note 93, at 1540-42 (jury unsuited to task of determining scope of products liability); Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 440-41, 458-59 (1974) (judge properly equipped to make technical determinations). *But see* R. KEETON, *supra* note 113, at 49-60 (determination of risk is fact-oriented, requiring evaluative judgement with respect to the facts).

[126] *See* Note, *supra* note 113, at 1023-25. Proponents of duty-risk analysis contend that the judge should determine whether a duty was owed. *Id.* This allows for clear articulation

making the decision claim that the determination of the scope of the risk requires an evaluative finding based on the facts.[127] Although duty may be an aspect of a strict products liability case, it is a generalized duty imposed by law to avoid disseminating dangerously defective products, not a particularized duty to avoid conduct which creates a foreseeable risk of harm. Thus, it leaves little room for the policy considerations found in negligence determinations of a precisely stated duty of care. If the judge were to decide the scope of the risk as a duty question in strict products liability, the nature of the action would be distorted.

Regardless of whether the judge or jury is making the determination however, the most critical factor in the use of risk analysis is how to define the concept of risk and how to advise those charged with determining its scope. As one leading proponent of risk analysis has noted:

> In the area of products liability, this question of the scope of the risk on the basis of which the conduct or activity is determined to be tortious is intimately associated with the concept of defectiveness of the product. That is, the liability of the manufacturer or supplier is ordinarily based on the conclusion that the product is in some way defective; and the scope of liability extends only to those injuries that arise out of the defect.[128]

If the scope of the risk extends to injuries that are caused by the defect in the product, what is the result in cases in which the defect has caused the plaintiff to suffer psychic harm?

As a starting point in defining risk, it is fair to say that the risk in strict products liability is that dangerously defective products will cause injury to legally protected interests.[129] If the interest in psychic equilibrium is a legally protected interest, then an invasion of it by a defective product must be within the scope of the risk. Thus, as a first step, the judge should make it clear to the jury that the interest in psychic harm is one that the law protects from invasions caused by defective products. Once this is accepted,

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of policy, thereby preventing the judge from relying on the ambiguous verbal formulations inherent in proximate cause analysis. *See* Maleson, *supra* note 8, at 18-19.

[127] *See* R. KEETON, *supra* note 113, at 49 (risk rule is heavily dependent on interpretation of facts); Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 85 (1982) (jury should weigh appropriateness of loss-shifting).

[128] R. KEETON, *supra* note 113, at 108-09.

[129] *See* W. PROSSER & W. KEETON, *supra note* 8, § 95, at 677-79.

if the plaintiff's psychic harm occurs as a result of the defective product causing fear for his own safety, it is not difficult to accept that such psychic harm is within the scope of the risk. More difficult issues arise if the plaintiff's psychic harm is a result of another person's contact with the defective product. The question is whether, in a generalized risk analysis, there is any effective way to limit liability. In other words, what happens if the nature of the harm suffered is not the kind of harm ordinarily caused or even likely to be caused by the defect in the product?

One approach is to have the jury decide the largely factual determinations of whether the product is defective, whether the plaintiff actually suffered psychic harm, and whether the defect caused, or was a substantial factor in causing, the psychic harm. Theoretically, in a pure risk analysis approach, these are the only determinations that need to be made. Certainly this approach would provide the broadest possible protection to the interest in psychic equilibrium and satisfy the most expansive policy objectives of strict products liability. However, it would no doubt horrify those who fear the worst in terms of limitless liability and a flood of litigation.

Another possibility is to introduce an aspect of "foreseeability" to the scope of the risk question without using the word "foreseeability." There is, after all, considerable authority for the proposition that some "foreseeable" danger is involved anytime liability is imposed for the creation of risks.[130] Thus, in a risk analysis approach, there could be an added component calling for the jury's evaluative judgment in light of the harm suffered, the class of the plaintiff, and the situation giving rise to the harm. For example, the judge might inquire whether the jury would find that a person in the plaintiff's position, and under the circumstances created by the defective product, would be *likely* to suffer psychic harm. In making this determination the jury could consider factors such as the plaintiff's proximity to the incident; whether plaintiff was using the product at the time of the incident; and the plaintiff's relationship and proximity to another person injured by the product. An alternative that sounds slightly less like a "foreseeability" approach is to ask whether the psychic harm suffered by the

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[130] *See, e.g.*, Ross v. Phillip Morris & Co., 328 F.2d 3, 12 (8th Cir. 1964); Lartique v. R.J. Reynolds Tobacco Co., 317 F.2d 19, 23 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963); Gelusumio v. E.W. Bliss Co., 10 Ill. App. 3d 604, 607, 295 N.E.2d 110, 112 (1973); *see also* F. HARPER & F. JAMES, *supra* note 81, § 14.7; R. KEETON, *supra*, note 113, at 41-45.

plaintiff was so *atypical* in light of the circumstances of the case as to withdraw it from the scope of the risk created by the product defect.[131]

Although an inquiry based on the possible occurrence of an event might serve to allay the fears of those haunted by the spectre of unlimited liability and a flood of litigation, it smacks of a negligence foreseeability analysis inconsistent with strict products liability and arguably at odds with both risk analysis as a determiner of liability and with recognition of psychic equilibrium as an independent legal interest. If the scope of the risk in strict products liability is injury caused to any legally protected interest by a dangerously defective product, it should not matter how unlikely or atypical the harm was under the circumstances. If the defect in the product caused a damaging invasion of the legally protected interest, or, in risk analysis terms, if the harm complained of fell within the scope of the risk created, then the plaintiff should recover. Given the broad policy objectives of strict products liability and the need to recognize psychic harm as an independent interest, the fact that the scope of liability may be broad should not be alarming. Unfortunately, in light of the current concerns associated with both the explosion of strict products liability and the potential for false or trivial claims[132] in an area such as psychic harm in which objective symptomatology is often lacking, it is probably unrealistic to expect that a pure risk analysis will be widely accepted without some restraint on the potential for runaway liability.

What is needed is a method for limiting liability that will satisfactorily accommodate all of the interests involved without diluting the doctrinal and policy foundations of strict products liability. One solution to this perplexing problem would be the imposition of one or more carefully defined, practical, external liability-limiters. These would be outside the legal theory of the case and would provide for the use of a liability-defining device consistent with strict products liability while appeasing those fearful of granting psychic equilibrium full protection.

2. Practical External Limitations on Liability

As a preliminary matter, it is important to distinguish be-

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[131] *Cf.* A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 63-64 (1951) ("test of general typicality").

[132] *See supra* notes 28-40 and accompanying text.

tween a practical, principled method of limiting liability and a practical, arbitrary method.[133] As used here, a practical external liability limiter is one that is unrelated to the theory of the case and that can be imposed with relative ease by judge or jury to distinguish between those psychic harm sufferers who should recover and those who should not. To be practical and principled, the line must be drawn in a way that takes into account the competing policies and interests at stake and that makes a reasonable accommodation among them. In a claim for psychic harm, those policies and interests include the plaintiff's interest in being compensated for injury to a legally recognized interest, the defendant's interest in being free from unlimited and indeterminable liability, and the interest of the legal system in the efficient administration of justice.

By contrast, a practical external liability limiter is arbitrary if it furthers one policy or interest at the expense of another without full consideration of whether a different rule could be imposed that would better afford protection to all the interests. It may, for example, put undue emphasis on ease of application and insufficient emphasis on the hard policy questions. A number of "arbitrary" liability limiting devices, such as the impact requirements, zone of danger, and physical injury,[134] were considered in connection with the evolution of psychic equilibrium as a protected interest.

The requirement that psychic harm be manifested in physical symptoms was discussed earlier in connection with the evolution of the protection afforded psychic equilibrium.[135] It must be reconsidered in the context of strict products liability because section 402A of the Restatement (Second) of Torts imposes liability upon sellers of defective products "for physical harm . . . caused to the ultimate user or consumer, or to his property."[136] A few courts have interpreted this to preclude recovery for psychic harm.[137]

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[133] For a discussion of arbitrary rules in the context of bystander recovery for psychic harm, see Pearson, *supra* note 15, at 478-84.

[134] *See supra* notes 55-68 and accompanying text.

[135] *See supra* notes 64-66 and accompanying text.

[136] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[137] *See, e.g.*, Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 440-43, 428 N.E.2d 596, 597-99 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983); Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 355, 374 N.E.2d 683, 687-88 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980). *But see* Wetherill v. University of Chicago, 565 F. Supp. 1553, 1560 (N.D. Ill. 1983) (recovery for emotional distress in strict liability denied in *Woodill* only for witnessing injury of another). In *Woodill*, the parents of a child severely injured *in utero* after a prescription drug was administered to the mother were denied compensation for their emotional distress in their strict liability action. 58 Ill. App. 3d at 349, 356, 374 N.E.2d at 684-85, 687-

The physical harm requirement is certainly a "practical" rule of liability. It is a consideration unrelated to the nature of the cause of action, with its focus instead on the nature of the injury. It can be applied with relative ease by judge or jury to eliminate an entire class of psychic harm sufferers from legal protection, for example, those who have no physical symptoms. At one time, before it was well established that serious psychic harm might occur without physical manifestation, this rule of liability may have been a reasonable way of approaching liability in psychic harm cases. However, in light of what is now known about the relationship between physical symptomatology and psychic injury,[138] the physical harm requirement must today be considered an arbitrary limitation. Nevertheless, the continued judicial reliance on this requirement, in addition to the reference to it in section 402A, suggest that it must be examined to determine exactly how it should be construed and applied as a limiting device in strict products liability cases.

"Physical harm" as used in section 402A can be interpreted in several ways. In its most restrictive sense, it can be read to mean an actual corporeal invasion caused by a defective product, or an illness caused by contact with or ingestion of a defective product.[139] If this interpretation is accepted, no recovery for psychic harm would be permitted in strict products liability cases based on section 402A. Although the direct invasion or contact construction of "physical harm" has been suggested,[140] contraindications militate in favor of a broader interpretation. The commentary to sec-

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88. The court reasoned that section 402A of the Restatement was designed to compensate only physical harm in strict liability actions. *Id.* at 356, 374 N.E.2d at 688. Similarly, in *Rickey*, the court held that emotional distress was not a compensable injury under a theory of strict liability when a minor sought recovery for the anguish caused by seeing his brother choked and rendered comatose when his clothes became entangled in an escalator. *See* 101 Ill. App. 3d at 442-43, 428 N.E.2d at 597-99.

[138] *See supra* note 30 and accompanying text.

[139] *See, e.g.*, Mink v. University of Chicago, 460 F. Supp. 713, 719 (N.D. Ill. 1978). In *Mink*, women were given DES as part of a medical experiment. *Id.* One count of the suit sounded in strict products liability, with the plaintiffs claiming that they suffered severe mental distress from the increased risk of their children contracting cancer due to the drug. *Id.* The court interpreted section 402A of the Restatement as requiring physical injury, and dismissed the claim of emotional distress as insufficient to support a claim in strict products liability. *Id.*

[140] Shepard v. Superior Ct., 76 Cal. App. 3d 16, 23, 742 Cal. Rptr. 612, 616 (1977) (Vane, J., dissenting); Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 442, 428 N.E.2d 596, 599 (1981), *aff'd*, 98 Ill. 2d 546, 453 N.E.2d 1 (1983); Woodill v. Parke Davis & Co., 58 Ill. App. 3d 349, 356, 374 N.E.2d 683, 688 (1978).

tion 402A provides no hint as to how physical harm should be interpreted, however, other sections of the Restatement are more helpful. Section seven of the Restatement (Second) of Torts defines physical harm as "the physical impairment of the human body, or of land or chattels."[141] No restrictions are given with respect to the cause of the bodily impairment. In addition, the commentary to section 436A, dealing with emotional distress in negligence, indicates that "bodily harm" includes such disorders as continued nausea and headaches, as well as "repeated hysterical attacks, or mental aberration," which "may be classified by the courts as illness, notwithstanding their mental character."[142] Furthermore, the courts have long recognized that physical harm may result from psychic stimuli, and have interpreted physical harm to include symptoms that are largely mental, such as nervousness, depression, and hysteria.[143] Certainly, the recent recognition of the interdependence of the mind and body suggests that the term "physical harm" could be interpreted to include psychic harm, regardless of whether the psychic harm has had physical manifestations.

It is also possible to consider the section 402A physical harm requirement satisfied by physical manifestations of psychic harm. This view suffers the same shortcomings of the physical manifestation requirement discussed earlier in relation to negligent infliction of psychic harm. Such an interpretation is particularly untenable in a jurisdiction in which an enlightened approach to psychic harm is applied in negligence cases. To require physical symptoms in a strict products liability case and not in a negligence case would be patently irrational.

Another interpretation of the physical harm requirement in section 402A is that the drafters intended to make a distinction between "physical" harm and "economic" harm rather than a dis-

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[141] *See* RESTATEMENT (SECOND) OF TORTS § 7 (1965).

[142] *See id.* § 436A comment c (1965).

[143] *See, e.g.*, Strazza v. McKittrick, 146 Conn. 714, 719, 156 A.2d 149, 152 (1959) (fright caused by truck crashing into house was compensable injury); Ferrara v. Galluchio, 5 N.Y.2d 16, 20-22, 152 N.E.2d 249, 251-53, 176 N.Y.S.2d 996, 998-1000 (1958) (cancerphobia constitutes compensable injury in medical malpractice action); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 410, 234 A.2d 656, 660 (1967) (despite absence of physical injury, plaintiff may recover for fright caused when truck crashed into house); *see also* RESTATEMENT (SECOND) OF TORTS § 436A comment c (1965) (lengthy mental disturbance may be deemed illness despite its mental character).

tinction between physical harm and psychic harm.[144] In this sense, "physical" would be a general term referring to harms to the "self" and would include both bodily and mental injuries. This construction accords with the idea that body and mind are inextricably connected and no injury to one can occur without some impact on the other. Under this broad interpretation, no psychic injury would escape protection solely because no objective physical symptoms had occurred, and the expansive policies underlying strict products liability would be best served.

The courts in several recent negligence cases extending full protection to psychic equilibrium have held, as an alternative to the physical harm requirement, that the psychic harm must be "serious."[145] Like the physical harm requirement, the seriousness requirement limits liability by focusing on the nature and degree of the injury rather than on the relationship between the conduct and the injury.

The "seriousness" requirement is more difficult to apply than the physical manifestation requirement. In the latter, the determination can be made purely as a matter of fact based on whether there were physical manifestations. The former, however, requires an evaluative judgment based on the plaintiff's testimony and expert medical evidence. Thus, the determination of whether the judge or the jury decides the "seriousness" issue may affect its practicality as a liability limiter. The seriousness standard is not so complex, abstract, or open-ended that the jury would have difficulty understanding what they are being asked to decide. In fact, it would be an unusual case in which there were no objectively identifiable indications of seriousness even if there were no physical symptoms. Thus, juries given adequate information are capable of reaching a sensible conclusion on the seriousness issue. Furthermore, negligence cases provide guidance on the types of harm that are sufficiently serious. In *Paugh v. Hanks*,[146] the court found that emotional distress must be both "severe and debilitating," and that such emotional distress would include "traumatically induced

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[144] *See* Seely v. White Motors Co., 63 Cal. 2d 9, 18, 403 P.2d 145, 151, 45 Cal. Rptr. 17, 23 (1965).

[145] *See* Rodrigues v. State, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970); Paugh v. Hanks, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 765 (1983); Sinn v. Burd, 486 Pa. 146, 167-68, 404 A.2d 672, 683 (1979).

[146] 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

neurosis, psychosis, chronic depression, or phobia."[147] The court in *Bass v. Nooney Co.*[148] held that the harm must be "medically diagnosable and must be of sufficient severity so as to be medically significant."[149] Thus, the "seriousness" test is not so difficult as to make its application impractical.

This leaves the question of whether the seriousness requirement is a standard that adequately considers the various interests and policies involved. From the plaintiff's point of view, the seriousness requirement is more equitable than the physical manifestation requirement. In one sense, the seriousness requirement is arbitrary because no similar requirement exists in cases involving physical injury. If both bodily integrity and psychic equilibrium are legally protected interests, it seems inconsistent to require serious harm in cases of injury to one and not the other. However, though both are entitled to legal protection, the nature of the interests is not the same. Things psychic are still more mysterious and less comprehensible than things physical, and only recently scientists have begun to delve into the depths of the psyche. The injuries that it can sustain and the ramifications of such injuries are not as widely known or understood as are bodily injuries. Proof of seriousness may help allay any remaining fears that such injuries are trivial or likely to be feigned.

Additionally, it is obvious that a certain amount of emotional upset is part and parcel of existing in a crowded and often uncongenial world.[150] There is a need to learn how to cope with the minor ruffling of the emotional feathers that afflicts everyone from time to time. The maxim *de minimus non curat lex* applies to psychic harm as well as to other kinds of harm. Thus, from the plaintiff's standpoint, the seriousness requirement seems to be a reasonable compromise position between the need to compensate genuine injury and the need to toughen the hide against "the slings and arrows of outrageous fortune."[151]

The defendant's primary interest in psychic harm cases is the need to have some effective way of avoiding endless liability. The seriousness requirement, though perhaps not adequate in itself, is

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[147] *Id.* at 79, 451 N.E.2d at 765.

[148] 646 S.W.2d 765 (Mo. 1983) (en banc).

[149] *Id.* at 772-73.

[150] RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965); Magruder, *supra* note 43, at 1035.

[151] HAMLET, Act III, Scene i, line 58.

a sensible approach to identifying the type of harm for which the defendant will be responsible. Although probably not as effective at eliminating classes of defendants as a "foreseeability" or "physical symptom" requirement, the seriousness standard will help to prevent the filing of trivial suits. Even if the "seriousness" requirement does not specifically identify the extent of liability, as between a plaintiff who has suffered serious harm and a defendant who has supplied a defective product, it does not seem unjust to require the defendant to compensate the injured party. Although the defendant might not be able to identify those who may potentially recover, liability will not be limitless because only those with serious psychic harm will succeed.

An additional consideration is the impact that the seriousness requirement will have on the court system. Although perhaps not the primary concern, the potential for a multitude of trivial and possibly fraudulent claims is still a matter for concern. If seriousness is a question of law for the judge, its effect will be to cut down the number of psychic harm cases that are fully litigated. Even if seriousness is regarded as a jury question, it is likely that only those injured parties convinced that they can actually prove serious psychic harm will seek legal vindication of their claims. Thus, the number of psychic harm cases should not prove overly burdensome for the legal system.

Another limiting device used in several cases involving the negligent infliction of psychic harm that could be used in a strict products liability context, is the requirement that "a reasonable man, normally constituted, would be unable to cope adequately with the mental stress engendered by the circumstances of the case."[152] This objective element requires a determination of whether the circumstances that caused the psychic harm would have caused such harm in one with a "normal" psyche.

The question of whether the normal person would be able to cope will be for the jury to decide.[153] In determining the effectiveness of this approach, the question arises whether the introduction

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[152] Rodrigues v. State, 52 Hawaii 156, 173, 472 P.2d 509, 520 (1970); *see* Paugh v. Hanks, 6 Ohio St. 3d 72, 79, 451 N.E.2d 759, 765 (1983); *see also* Sinn v. Burd, 486 Pa. 146, 168, 404 A.2d 672, 683 (1979) (unreasonable to impose liability for mental distress experienced by timid, sensitive members of community).

[153] Paugh v. Hanks, 6 Ohio St. 3d 72, 80, 451 N.E. 2d 759, 767 (1983); *see also* W. PROSSER & W. KEETON, *supra* note 8, § 37, at 235 (juries determine factual issues in negligence actions).

of this objective element would so complicate the case that the jury would not understand what it was being asked to decide. Because the ability to cope varies considerably from person to person, the "normal ability to cope" standard could be a difficult concept to pin down. Juries, however, are regularly asked to make determinations based on what "the reasonable man" would have done. The "normal ability to cope" standard is different only in that it asks what the reasonable man would have suffered. Jurors should be able to draw on their own experiences to determine whether the reasonable person, normally constituted, would have suffered serious harm in the same or similar circumstances.

The "normal ability to cope" standard obviously excludes those with a subnormal ability to deal with circumstances that might produce a psychic disturbance. In light of the oft-stated tort aphorism "you take the plaintiff as you find him,"[154] the question arises whether there is any justifiable reason for protecting the egg shell skull, but not the egg shell psyche.[155] If no such reason exists, this standard may have to be characterized as arbitrary, rather than principled. Again, the resolution of this issue depends on whether the policy furthered by application of the "normal ability to cope" standard is outweighed by competing and inconsistent policies. The innocent, injured plaintiff has an interest in being compensated, regardless of whether he happens to be unusually vulnerable to psychic stimuli. On the other hand, it has already been noted that there is a societal benefit to be derived from encouraging people to deal with a certain amount of emotional unpleasantness. The defendant's interest in being free from interminable liability may tip the balance in favor of imposing this

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[154] *See, e.g.*, Dulieu v. White & Sons, [1901] 2 K.B. 669, 679. In *Dulieu*, a pregnant woman who was frightened by the defendant's negligent driving of a horse van gave birth prematurely to a mentally incompetent child. *See id.* at 670. The court drew a now-famous analogy to a man with an "unusually thin skull" who suffers extraordinary injuries from the negligence of another to illustrate that the defendant takes the plaintiff as he finds him. *See id.* at 679; *see also* W. PROSSER, J. WADE, & V. SCHWARTZ, TORTS: CASES AND MATERIAL 304 n.2 (7th ed. 1982) (courts "are agreed" that defendants are liable when unforeseeable consequences result to plaintiff from defendants' acts).

[155] A related problem arises if the circumstances created would cause serious psychic harm in the person with a normal ability to cope, but the plaintiff, because of an idiosyncracy or pre-existing condition, suffers more damage than would a normal person. In such a case, the defendant should pay the entire damage. Any other position would produce a damage rule that would be virtually unworkable, since the jury would then have to calculate how much damage a normal person would have suffered. If this approach were taken, the "normal ability to cope" standard would be impractical.

objective criterion. This is particularly true in strict products liability cases involving psychic harm, since the only other liability-limiter may be a broad interpretation of the scope of the risk. If a "normal ability to cope" requirement is imposed, the number of psychic harm recoveries will be significantly reduced. In fact, such a standard would probably limit liability in much the same manner that foreseeability would. Without a foreseeability-type limitation included in the broad scope of the risk approach, the television viewer who claims psychic harm from seeing a stranger injured may be able to recover. The imposition of a "normal ability to cope" test will eliminate this class of plaintiffs. Jurors applying their own experiences are unlikely to find that the normal person could not cope with this kind of stress. Under this approach, although there will be a few idiosyncratic plaintiffs, or plaintiffs with pre-existing mental conditions who will suffer uncompensable injuries, on balance, the "normal ability to cope" approach seems reasonable. Furthermore, this approach would probably not have a material impact on the judicial system. Although the requirement would likely reduce the number of suits filed, the standard does nothing to cut litigation off at an early point, because the question of whether the plaintiff possesses a "normal ability to cope" would be a question of fact for the jury rather than a question of law for the judge.

An alternative to the seriousness and "normal ability to cope" standards that would considerably simplify the determination of liability for psychic harm would be a rule that would limit damages to the plaintiff's actual economic loss.[156] If ease of application is a positive factor in determining the extent of liability, restricting damages in this way has a distinct advantage over the other methods. Once injury and cause-in-fact are established, the only remaining question is what out-of-pocket losses the plaintiff has suffered as a result of psychic harm. Under this approach, medical expenses, lost wages, and future earning capacity would all be compensable items of damage, while grief, fear, and similar emotional injuries would not.

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[156] *See* Miller, *supra* note 5, at 38-43. Miller has proposed eliminating recovery for purely emotional pain and suffering, while allowing recovery only for economic losses, such as medical expenses. *See id.* The policy considerations advanced by Miller, while not embraced *per se* by the courts, are reflected by analogy in some decisions. *See, e.g.*, Pinnick v. Cleary, 360 Mass. 1, 5-8, 271 N.E.2d 592, 597-98 (1971) (court upheld statute eliminating recovery for pain and suffering for certain claimants of "no fault" insurance).

This proposal is consistent with an economic approach to strict products liability that is concerned with risk allocation and the cost of accidents. Although it is likely that only serious psychic harm would result in actual economic outlay, seriousness would not be a consideration. In addition, the question of whether a person with a normal ability to cope would have suffered the harm would be irrelevant. Because idiosyncratic plaintiffs would be permitted to recover, the size of the protected class might increase, but the amounts of individual recoveries would be reduced. Thus, although the *extent* of the defendant's liability would actually broaden, plaintiffs might argue that this approach would affect them negatively. In fact, certain grounds for recovery generally associated with psychic harm, such as grief, humiliation, anger, and fear, would not be recoverable. This approach, however, would guarantee that no plaintiff who suffers an economic loss would go without recovery and would ensure that the scope of liability would be determinable.

It is not altogether clear what impact limiting damages to economic loss would have on the efficient administration of justice, but it is arguable that it would encourage pretrial resolution of cases. If the defendant admits that the product is defective, and caused the injury, all that remains is to establish the amount of the plaintiff's actual loss. Although this is a radical approach unlikely to achieve wide acceptance, it may be the best way to accommodate the various competing interests in strict products liability cases. It would allow for a risk analysis approach without opening the doors to indeterminable liability. If used in all strict products liability cases, this proposal could provide a workable solution for the current crisis in strict products liability law.

An examination of liability limiters in strict products liability psychic harm cases would not be complete without a discussion of the user-bystander distinction recently applied by a few courts.[157] Although the origin of this method for limiting liability is not alto-

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[157] *See, e.g.*, Gnirk v. Ford Motor Co., 572 F. Supp. 1201, 1202-03 (D.S.D. 1983) (dictum) (bystander cases "typically void of any product liability implications"); Barr v. Rivinius Inc., 58 Ill. App. 3d 121, 126, 373 N.E.2d 1063, 1066-67 (1978) (bystander injured by road construction machine cannot prevail inasmuch as his injury was not reasonably foreseeable by manufacturer); Vaccaro v. Squibb Corp., 52 N.Y.2d 809, 809, 418 N.E.2d 386, 386, 436 N.Y.S.2d 871, 871 (1980) (mem.) (mother alleging emotional distress for child's birth defects not entitled to recover). The confusion in this area of the law is fueled largely by the failure of the Restatement to express an opinion on the matter. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment o (1965).

gether clear, it appears to be unique to the products liability setting. Under this approach, a person who is using a defective product at the time it causes injury to a third person may recover for psychic harm, but a bystander who merely observes an incident in which a defective product causes injury may not.[158] Advocates of this test apparently consider the guilt associated with being indirectly responsible for the injury a significant factor in assuming that the plaintiff has actually suffered psychic harm.[159] The test is an easy one to apply. Generally, a cursory examination of the facts will reveal whether the plaintiff was using the injury-producing product. If the object of the practical liability limiters however, is to achieve a rational means of accommodating both the need to protect those who have suffered psychic harm and the need to define liability, the user-bystander distinction must be rejected. It carries with it the potential for anomalous results, such as denying recovery to a bystander-parent who is obviously likely to suffer physical harm but granting recovery to a user-stranger who has no personal relationship with the injured individual. Although a plaintiff's use of a product at the time an injury occurred may be a relevant consideration in making a decision whether to impose liability under one of the other tests, the user-bystander distinction, as a liability-limiting rule, is highly arbitrary.

3. Recommendation

Because strict products liability is concerned with the defendant's creation of a risk that carries with it the potential for harm, a theory of liability for psychic injury resulting from defective products should be consistent with a broad risk analysis. There is no doubt, however, that liability limited only by a determination of whether the injury was within the scope of the risk created by the defect in the product carries with it the possibility of attenuated and indeterminable liability. To alleviate this problem, combining

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[158] *Compare* Shepard v. Superior Court, 76 Cal. App. 3d 16, 18, 142 Cal. Rptr. 612, 613 (1977) (parent driving defective car could recover for physical injuries resulting from emotional shock brought on by witnessing infliction of fatal injuries on daughter caused by defect) *with* Rickey v. Chicago Transit Auth., 101 Ill. App. 3d 439, 440, 442-43, 428 N.E.2d 596, 597, 599 (1981) (minor who witnessed brother suffer severe injuries caused by defective escalator denied recovery for emotional distress under strict liability theory), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

[159] *See* Joseph, *supra* note 11, at 2; Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1, 4 (1970); Note, *supra* note 11, at 301.

the requirements that the harm actually be serious and that the circumstances be such that the normally constituted person would not be able to cope with them, is a reasonable compromise of the various competing interests. It can be applied with relative ease to a strict products liability case without muddying the doctrinal waters with extraneous negligence concepts such as foreseeability.

IV. Recovery For Psychic Harm in Strict Products Liability: A Survey of Cases

The few courts that recently have faced the question of whether damages for psychic harm should be recoverable in a strict products liability context, with few exceptions, have shown the reluctance that has come to typify the attitude toward psychic harm. In large part, the reasons for this resistance have tracked the reasons for denial of recovery in earlier cases in which the theory of the action was intentional tort or negligence. Some of the reasoning offered in the recent cases, however, suggests that there may be something unique about strict products liability that compels an approach different from that taken in a negligence case.

It has already been noted that psychic harm takes numerous forms and that the circumstances giving rise to it are many and varied.[160] Although this is no less true in situations involving defective products than in other areas, a few recurring patterns can be identified. In the interest of clarity and to facilitate discussion, the cases will be grouped according to the following recurring situations: cases in which the consumption of a contaminated food product causes psychic harm, cases in which the fear of injury through a sudden encounter with a defective product causes psychic harm, cases in which a bystander's observation of another's encounter with a defective product causes psychic harm, and cases in which exposure to a carcinogenic substance causes psychic harm (the "cancerphobia" cases). Similarity of factual situations in no way ensures uniformity of results in strict products liability cases claiming psychic harm. The response of a court depends in large part upon how the jurisdiction approaches the various issues presented in the case. For instance, does the jurisdiction require impact? Has it extended liability for psychic harm to bystanders? Does it require physical harm and, if so, how does it define it? Has it extended strict products liability to bystanders? Once the inde-

[160] *See supra* notes 20-27 and accompanying text.

pendent status of psychic harm as a legally protected interest is firmly established and a satisfactory method for limiting liability is accepted by the courts, much of the confusion and inconsistency inherent in the case law will be avoided.

A. *Contaminated Consumables*

Early products liability cases that allowed recovery for psychic harm usually involved psychological reactions to the discovery of foreign objects or substances in food or drink. Perhaps the willingness of courts to allow recovery in strict products liability in this kind of case relates to the long history of recovery for psychic injuries in contaminated food cases.[161] For whatever reason, the contaminated food cases made an easy transition from negligence and breach of warranty theories to strict products liability. As a broad proposition, it is fair to state that psychic harm is a ground for recovery under strict products liability if a consumable is contaminated by a foreign substance.[162] For example, awards for psychic harm have been based on strict products liability in cases in which the plaintiff partially consumed a soft drink containing a decomposed mouse,[163] a soft drink containing a " 'grayish brown' and 'slimy looking' substance,"[164] a soft drink containing metallic filings,[165] a beer containing a mouse,[166] and a can of soup containing a cockroach.[167]

The courts have not expressed concern with the problem of limiting liability in contaminated food cases, perhaps because there are common characteristics that may act as liability limiters. In each case, the plaintiffs have actually consumed a part of the beverage and have subsequently manifested a cognizable physical reaction to discovery of the unsavory substance. The physical mani-

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[161] *See* R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 236-37 (1951); *supra* note 84.

[162] *See, e.g.*, Kroger Co. v. Beck, 176 Ind. 202, 204-05, 375 N.E.2d 640, 643 (1978) (hypodermic needle in steak); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 441-42, 420 P.2d 855, 857 (1966) (decomposed mouse in bottled beverage).

[163] Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 441, 420 P.2d 855, 857 (1966).

[164] Stewart v. Barq's Beverages, Inc., 442 So. 2d 799, 799 (La. Ct. App. 1983).

[165] Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 11, 499 P.2d 741, 742 (1972).

[166] Dirsa v. Martuscello, 76 App. Div. 2d 1020, 1021, 429 N.Y.S.2d 483, 484 (3d Dep't 1980) (mem.).

[167] Obieli v. Campbell Soup Co., 623 F.2d 668, 668-69 (10th Cir. 1980).

festations, however, have ranged from the relatively slight[168] to the severe.[169] As Professor Dickerson observed more than three decades ago, "[w]henever the plaintiff's condition is directly related to the *discovery* of the offending condition, it may be taken for granted that psychological factors have played the preponderate part."[170] Thus, psychic injury of at least one sort has long been recognized in strict products liability.

B. *Personal Encounter With Defective Product Causing Psychic Harm*

There are few reported cases in which a plaintiff has sued to recover for psychic harm suffered as a result of a personal encounter with a defective product, and none in which psychic harm has been the only injury claimed.[171] As in other strict products liability cases claiming psychic harm, the result depends on the approach of the jurisdiction both toward the physical injury requirement in strict products liability and toward recovery for psychic harm in general.

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[168] *See, e.g.*, Way v. Tampa Coca-Cola Bottling Co., 260 So. 2d 288, 288 (Fla. Dist. Ct. App. 1972) (rat in bottle caused vomiting); Connell v. Norton Coca-Cola Bottling Co., 187 Kan. 393, 394, 357 P.2d 804, 806 (1960) (centipede in bottle resulted in nausea and vomiting); Boyd v. Coca-Cola Bottling Co., 132 Tenn. 23, 25, 177 S.W. 80, 80 (1915) (cigar stub in sealed bottle of soft drink caused nausea).

[169] *See, e.g.*, Obieli v. Campbell Soup Co., 623 F.2d 668, 669 (10th Cir. 1980) (stomach disorder, venous thrombosis, pulmonary emboli, and esophageal hiatus hernia requiring hospitalization); Slonsky v. Phoenix Coca-Cola Bottling Co., 18 Ariz. App. 10, 11, 499 P.2d 741, 742 (1972) (severe nausea); Stewart v. Barq's Beverages Inc., 442 So. 2d 799, 799 (La. Ct. App. 1983) (nausea, diarrhea, and dizziness); Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 446, 420 P.2d 855, 859 (1966) (vomiting and weight loss); Dirsa v. Martuscello, 76 App. Div. 2d 1020, 1021, 429 N.Y.S.2d 483, 484 (3d Dep't 1980) (mem.) (gastroenteritis, intestinal distress of the pylorus, hyposthenia, dysnystaxis, painful swallowing, and phobia of bottled liquids).

[170] R. DICKERSON, *supra* note 161, at 238.

[171] Awards for psychic harm have traditionally been low, and most attorneys discourage clients from pursuing claims in which the amount of the award is unlikely to cover even the cost of the litigation. Thus, the few cases in which courts have addressed the problem of a plaintiff who has been psychically harmed through a direct confrontation with a defective product have involved physical harm caused by psychic trauma or psychic harm accompanying some other injury caused by the product. *See, e.g.*, DeSantis v. Parker Feeders Inc., 547 F.2d 357, 366 (7th Cir. 1976) (recovery for psychic harm accompanied by physical injury to leg).

1. Psychic Harm Without Physical Injury

The Illinois Appellate Court in *Rahn v. Gerdts*,[172] recently held fast to that state's restrictive interpretation of the physical harm requirement of section 402A. In *Rahn*, the plaintiff was forced to leap from her burning motor home. Although she was not injured, several weeks later she entered a hospital psychiatric ward where she was treated for depression, anxiety, and nervousness. The court followed an earlier Illinois bystander case which held that damages caused by emotional distress, unaccompanied by other physical injury, are not compensable in a strict liability action.[173] Because nervousness, depression, and anxiety frequently have been recognized as sufficient to satisfy a "physical manifestation" requirement,[174] it may be inferred that in Illinois, "physical harm" in strict products liability implies a physical injury caused by some direct contact with the defective product.[175]

The result in *Rahn* illustrates the difficulties engendered by a restrictive interpretation of the "physical harm" limitation in section 402A. The plaintiff in *Rahn* suffered psychic injury as a direct result of a traumatic experience caused by a defective product. The harm was so severe that she was hospitalized and needed psychiatric care. Under any of the recognized or recommended methods for defining liability, the plaintiff should recover. It is certainly "fore-

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[172] 119 Ill. App. 3d 781, 455 N.E.2d 807 (1983).

[173] *Id.* at 784-85, 455 N.E.2d at 809; *see* Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 38, 402 N.E.2d 194, 200 (1980). For a discussion of *Woodill*, see *infra* notes 228-232 and accompanying text.

[174] *See, e.g.*, Krouse v. Graham, 19 Cal. 3d 59, 76-77, 562 P.2d 1022, 1031, 137 Cal. Rptr. 863, 872 (1977); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433, 426 P.2d 173, 178-79, 58 Cal. Rptr. 13, 18-19 (1967) (en banc); Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 234, 249 P.2d 843, 844 (1952).

[175] The *Rahn* court further concluded that Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1 (1983), which broadened recovery for negligent infliction of emotional distress to cover non-impact situations, did nothing to change the Illinois requirement of direct contact because the focus in *Rickey* was on the nature of the defendant's conduct. *Rahn*, 119 Ill. App. 3d at 784-85, 455 N.E.2d at 809. The Court of Appeals in *Rahn* read the Illinois Supreme Court opinion in *Rickey* to limit recovery to negligence cases, in which the focus is on foreseeability. *Id.* Although the court noted that there might be some support for the plaintiff's suggestion that the rationale for permitting recovery for mental distress in negligence cases should be applicable to strict products liability, the court declined to extend it absent direction from the Illinois Supreme Court. *Id.* The language used by the court on this point is not altogether clear, but the implication is that foreseeability might not be a relevant factor in a strict products liability case. Even if this is a correct interpretation, it is clear that the plaintiff claiming psychic harm without actual contact in Illinois should pursue a negligence claim if one is available, because a strict products liability recovery undoubtedly will be denied.

seeable" that the necessity of leaping from a flaming trailer will cause severe fright that might necessitate future care. In the event that foreseeability is rejected as a limiter in strict products liability, it cannot be denied that the harm was "serious" or that a normally constituted person would react in such a manner, or at least that the issue of harm should be decided by a jury. Further, under an economic loss theory, it is clear that the plaintiff could establish that she had incurred medical expenses and, very likely, that she had either lost earnings or incurred expenditures for child care. To deny recovery merely because the plaintiff did not establish adequately "physical harm" flies in the face of any policy underlying strict products liability.

In marked contrast to the narrow approach to "physical harm" taken by the court in *Rahn,* is the broad reading given the physical harm requirement of section 402A by the Third Circuit Court of Appeals in *Walters v. Mintec International.*[176] The plaintiff in *Walters* claimed physical injury from psychic disturbance after he narrowly escaped serious injury or death when a loading crane designed by Mintec collapsed. In response to Mintec's claim that injury resulting from psychic shock can never be physical harm within the meaning of 402A, the court pointed to the Restatement (Second) of Torts definition of physical harm and to section 436[177] relating to physical harm resulting from emotional distress. Noting the kinds of symptoms considered sufficient to constitute physical harm in the commentary to 436A, it found the evidence of plaintiff's headaches, weakness under stress, insomnia, and nightmares sufficient to satisfy the physical harm requirement.[178] It also made special mention of plaintiff's psychiatrist's testimony that plaintiff suffered from post-traumatic stress syndrome, a mental illness. Because the court had before it a claim for physical harm caused by psychic injury rather than a claim for psychic harm alone, it is difficult to deduce whether a claim of the mental illness alone would have satisfied the court. It is obvious, however, that this court is open to the idea of allowing recovery for psychic harm under a theory of strict products liability. In reaching its conclusion that the defendant's defectively designed product was the legal cause of the plaintiff's injury, the court specifi-

[176] 758 F.2d 73 (3d Cir. 1985).
[177] *Id.* at 77-79.
[178] *Id.* at 78-79.

cally noted that the policy basis of strict products liability justified imposition of liability in cases in which plaintiff's injury is a result of psychic shock.

> There is no apparent reason why the policy objectives of section 402A should apply with less force when the physical harm results from emotional disturbance than when the harm results from some sort of tortious impact.
>
> Although it may be argued that liability should be more limited when it is imposed without regard to fault, there is little indication that such a concern would act as a limitation on the underlying policies of section 402A. The thrust of these policies is to expand rather than restrict liability, by placing the burden of the consequences of accidental injuries caused by products upon the party who is best able to bear it.[179]

The court's decision to make the extent of liability commensurate with the expansive policies underlying strict products liability is consistent with a broad risk analysis approach to determining the parameters of liability.

2. Psychic Harm Accompanying Physical Injury

A number of courts have made awards for psychic harm in addition to damages for physical injuries. Although it is not always clear which amount is attributable to the psychic harm and which amount to the physical injury,[180] in one recent case, the major part of the award was for the psychic harm. In *Thomasson v. A.K. Durnin Chrysler-Plymouth*,[181] the plaintiff was injured in an accident involving a defective automobile. She sustained some physical injury, but the bulk of her award was for the psychic harm she claimed as a result of the accident.[182] The case is particularly inter-

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[179] *Id.* at 79.

[180] *See, e.g.*, DeSantis v. Parker Feeders Inc., 547 F.2d 357, 366 (7th Cir. 1976). In *DeSantis*, the 12-year-old plaintiff was injured by a defective auger on a cattle feeder. *Id.* at 360. His injuries required the amputation of his left leg and two toes on his right foot. *Id.* A psychiatrist testified at trial that the plaintiff suffered a "posttraumatic personality disorder" that made it likely that he would suffer emotional difficulties in the future. *Id.* at 365. Although the $840,000 in damages was not broken down into physical and psychic components, the fact that the trial court allowed, and the court of appeals approved, the psychiatric testimony indicates that psychological damage is cognizable in a federal strict products liability case, at least when there is some physical injury.

[181] 399 So. 2d 1205 (La. Ct. App. 1981).

[182] *See id.* at 1209-10. The plaintiff in *Thomasson* was awarded $2,000 for physical injuries and $17,500 for mental suffering. *Id.*

esting because the plaintiff had suffered psychological disorders before the accident. Although the court, on appeal, recognized that the automobile "was carrying a very mentally fragile passenger when the accident occurred,"[183] and acknowledged that her psychic harm was unreasonable, it awarded her a sum for her mental distress almost nine times greater than the award for her physical injury. *Thomasson* is an excellent example of the difficulties caused by the eggshell psyche. The trial court recognized that the plaintiff had a pre-existing psychic disorder and considered the triggering of it compensable. If a defect in a product merely triggers a preexisting condition, however, it is questionable whether the defect was a substantial factor in causing the harm. This area of uncertainty, coupled with the subjective character of the injury and consequent problems of proof, militates in favor of imposing an objective standard in judging psychic harm. If the trial court in *Thomasson* had questioned whether the circumstances would have resulted in serious psychic harm in a normally constituted person, the response would have been negative. Although the imposition of an objective standard in an eggshell psyche case may result in a few legitimately injured plaintiffs going uncompensated, the defendant's interest in having some limitations and certainty as to the extent of his liability may tip the scale against the imposition of liability.

C. *Bystander Cases*

The bystander who suffers psychic harm from witnessing another's injury caused by a defective product has the most obstacles to overcome in strict products liability. To recover under such circumstances, a number of prerequisites must be met. Probably no state court would entertain such a suit absent adoption by the jurisdiction of:

(1) some form of strict products liability;
(2) a recognition that bystanders injured by defective products may recover;
(3) an acceptance of a cause of action for negligent infliction of emotional distress;
(4) an extension of that doctrine to allow recovery for emotional distress to bystanders witnessing injuries to third parties; and
(5) a broad interpretation of the physical harm requirement of

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[183] *Id.* at 1209.

section 402A.

Even if all these prerequisites can be satisfied, recovery is by no means assured. Because the results in these cases depend, to a large degree, on the state of the law in the place where the case was decided, the bystander cases will be discussed according to jurisdiction.

1. California

Appropriately, California, which was the first jurisdiction to adopt strict liability in tort for injuries caused by defective products,[184] and to extend recovery for emotional distress to a bystander who was not in the zone of danger,[185] was one of the first to extend recovery under strict products liability to bystanders injured by defective products,[186] and was the first jurisdiction to consider whether a bystander suffering psychic harm caused by witnessing an injury to a third party may recover under a strict products liability theory.[187] Three different divisions of the California Court of Appeal have considered this question with inconsistent results.

In *Park v. Standard Chemical Way Co.*,[188] the plaintiff sued in strict products liability for the psychic harm that she suffered as a result of finding her husband several hours after he had been injured by an exploding drain cleaner. The husband sued for his physical injuries and the wife for psychic harm and consequent physical injuries. The court recognized the husband's action for his injuries based on a theory of strict liability,[189] but summarily rejected the wife's claim, also based on strict liability, stating "that *Dillon v. Legg* which allowed recovery for emotional distress to a bystander not in the zone of danger did not apply because nothing in the complaint suggested any negligence on the part of the defen-

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[184] *See* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1962).

[185] *See* Dillon v. Legg, 68 Cal. 2d 728, 732-33, 441 P.2d 912, 915, 69 Cal. Rptr. 72, 75 (1968).

[186] *See* Elmore v. American Motors Corp., 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969).

[187] *See* Park v. Standard Chem. Way Co., 60 Cal. App. 3d 47, 50, 131 Cal. Rptr. 338, 339 (1976).

[188] 60 Cal. App. 3d 47, 131 Cal. Rptr. 338 (1976).

[189] *Id.* at 50, 131 Cal. Rptr. at 339.

dant."[190] The clear implication of the court's refusal to entertain the wife's cause of action absent a showing of negligence is that the *Dillon* doctrine is unavailable when the underlying theory is strict products liability or warranty. Unfortunately, the court gave no justification or explanation for its conclusion. The *Park* court could have avoided its overbroad conclusion that *Dillon* does not apply in strict liability[191] and still have found that, under the facts of the case, *Dillon* did not apply because two of the three *Dillon* foreseeability factors were not satisfied.[192] In this way the court could have avoided the question of whether the extension of *Dillon* to strict products liability is appropriate, by noting that Mrs. Park was not the type of bystander contemplated by *Dillon*.[193]

In *Shepard v. Superior Court*,[194] the Court of Appeal for the First District of California took the opposite view from that espoused in *Park*. The facts in *Shepard* provided a much better vehicle for the consideration of the extension of *Dillon* to strict products liability because all the *Dillon* requirements were met. In *Shepard*, the family of a child killed in a traffic accident brought a strict products liability action against the manufacturer of the car to recover for physical injuries resulting from emotional shock suffered after witnessing the injuries inflicted on the decedent.[195]

Ford, the defendant, argued that *Dillon* would apply only under a theory of negligence. The California Court of Appeal disagreed and extended *Dillon* to strict products liability,[196] apparently because the majority saw no distinction between a cause of action based on negligence and a cause of action based on strict products liability. The court stated that "[t]o permit recovery against the negligent driver and exempt the manufacturer responsible for the defective condition contributing to the injuries would defy common sense and be inconsistent with the realities of modern society."[197] The court further noted that any danger the manu-

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[190] *See id.*

[191] *See id.*

[192] *See id.* Mrs. Park was not near the scene of the accident and had no sensory observation of it. *Id.*; *see Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

[193] *See Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. After Ochoa v. Superior Ct., 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985), it is possible that not having sensorily experienced the accident would not have been fatal to Mrs. Park's claim.

[194] 76 Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977).

[195] *Id.* at 19, 142 Cal. Rptr. at 613-14.

[196] *Id.* at 20, 142 Cal. Rptr. at 614.

[197] *Id.* at 21, 142 Cal. Rptr. at 615.

facturer might suffer on account of a potential for unlimited liability could be controlled by the imposition of the *Dillon* restrictions.[198] Thus, if the *Dillon* foreseeability requirements are satisfied, the plaintiff states a cause of action for recovery of damages for emotional distress under strict liability, as well as under negligence. In support of its focus on foreseeability as the operative factor, the majority noted that the extension of strict products liability to redress injuries to bystanders is based on the idea that injury to bystanders is "a perfectly foreseeable risk of the maker's enterprise,"[199] and stated that "[u]nder the theory of strict liability, as in negligence, the injury and harm must be 'reasonably foreseeable.' "[200] Whether the concept of foreseeability has any legitimate role to play in strict products liability has been already discussed.[201] Although the result reached by the majority may be appropriate, the depth of its analysis of the problems involved leaves something to be desired.[202]

The most recent California case to address the issue of recovery for psychic harm in a strict products liability context is *Kately v. Wilkinson*.[203] In *Kately*, the plaintiff, owner of a speed boat, struck and killed a water skier because a defect in the boat caused the steering mechanism to malfunction.[204] The plaintiff and her daughter, who were in the boat at the time of the accident, claimed damages for psychic harm against the manufacturer based on both strict products liability and negligent infliction of emotional dis-

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[198] *See id.*

[199] *Id.* at 20, 142 Cal. Rptr. at 615 (quoting Elmore v. American Motors Corp., 70 Cal. 2d 578, 586, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657 (1969)).

[200] *Shepard*, 76 Cal. App. 3d at 20, 142 Cal. Rptr. at 615 (citing Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972)).

[201] *See supra* notes 70-72 and accompanying text.

[202] Unlike the majority in *Shepard*, the dissent gave careful consideration to important issues raised by the application of *Dillon* to cases based on strict liability. Among these issues are the difficulty of proving emotional injury, *see* 76 Cal. App. 3d at 25, 142 Cal. Rptr. at 617-18 (Kane, J., dissenting), the culpability of the defendant, *see id.* at 25-26, 142 Cal. Rptr. at 618 (Kane, J., dissenting), and socioeconomic considerations such as enterprise liability, *see id.* at 26-28, 142 Cal. Rptr. at 619-20 (Kane, J., dissenting).

[203] 148 Cal. App. 3d 576, 195 Cal. Rptr 902 (1983).

[204] *Id.* at 580-81, 195 Cal. Rptr. at 903-04. As the decedent, a family friend, was being towed as a skier, the steering column on the boat locked, causing the boat to circle and strike her. *Id.* The decedent was pulled from the water, and since the boat was inoperable, the plaintiffs, who were mother and daughter, "were compelled to sit with the decedent in her badly mutilated condition." *Id.* at 580, 195 Cal. Rptr. at 904. As a result of this, the plaintiffs experienced great physical and mental suffering, as well as emotional problems. *Id.* at 581, 195 Cal. Rptr. at 904.

tress.[205] Because the *Kately* court was unable to "conceive of any reasonable basis for applying a different rule in a cause of action for negligence than that applied in causes of action for products liability and breach of . . . warranty,"[206] it concluded that the plaintiffs need not establish physical harm.[207]

The most intriguing aspect of this case is the court's discussion of whether the appellant should be treated as a bystander, or as a user of the product.[208] The court concluded that the *Dillon* foreseeability factors should not restrict the plaintiff's recovery, because her injuries were a *direct* result of the defendant's tortious conduct.[209] The court applied the *Molien* foreseeability approach and found that the defendants should reasonably have foreseen that the plaintiff, as purchaser and operator of a defective boat, would suffer emotional distress if the boat malfunctioned and killed someone.[210] This kind of distress is foreseeable even if no familial relationship exists between the user and the victim.[211] Apparently, the court concluded that the responsibility and guilt that a person would naturally feel at being the agent, albeit the indirect agent, of another's death, is sufficient to satisfy the foreseeability requirement. It is foreseeable, of course, that the use of a defective product that causes the death of another may produce psychic harm in the user. It is equally foreseeable, however, that a bystander who sees a defective product kill a child she loved as a daughter, as she stands by helplessly, will suffer psychic harm. The situation in *Kately* highlights the difficulties in making a distinction between a user and a bystander, especially if the distinction is based on one being a foreseeable victim and the other not. Without the peculiarities of the California Harbors and Navigation Code,[212] the plaintiff's daughter would not have recovered.[213] It seems ab-

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[205] *Id.* at 579, 195 Cal. Rptr. at 903.

[206] *Id.* at 586, 195 Cal. Rptr. at 908.

[207] *Id.*

[208] *Id.* at 587-88, 195 Cal. Rptr. at 909. In the first part of its opinion, the Court of Appeals for the Fifth District of California addressed the question of whether the plaintiffs could recover for negligent infliction of emotional distress. *Id.* at 579, 195 Cal. Rptr. at 903. The court held that a close friendship was insufficient to satisfy the *Dillon* requirement that the parties be closely related, and therefore, that the plaintiffs would not recover under such a theory. *Id.*

[209] *Id.* at 589, 195 Cal. Rptr. at 910.

[210] *See id.* at 587-88, 195 Cal. Rptr. at 909.

[211] *See id.* at 588, 195 Cal. Rptr. at 909.

[212] *See* CAL. HARB. & NAV. CODE § 658(a) (Deering 1978).

[213] The Harbors and Navigation Code prohibits water skiing unless there is an observer

surd to make a distinction between the mother and the daughter in this instance based on the supposition that the psychic harm to the mother was more foreseeable simply because she was driving the boat.

There is some suggestion that foreseeability is not the only reason that the court allowed the user to recover while denying recovery to the bystander. One point on which the court focused that is arguably different from the foreseeability approach is that the user of a product is a direct victim, while the bystander is not.[214] The difficulty with this approach is that in a case such as this it is not altogether clear who the "direct" victims are. Arguably, the only "direct" victim is the water skier. The damages suffered by the plaintiff and her daughter were in one sense indirect, in that they occurred not as a result of any physical effect that the defective product had on them, but as a result of the effect the product had on the skier. On the other hand, the psychic shock of witnessing the mutilation and demise of another human being was in every sense direct. If this analysis is used, it is difficult to understand how the psychological impact of such a tragic event can be regarded as direct with respect to the user, and only indirect with respect to the bystander. Certainly, from the standpoint of causation, the effect is the same because the defect in the product caused the daughter's injuries no less than it caused the mother's. Although the fact that the plaintiff was using the product at the time it malfunctioned is a relevant factor, it should not be the only factor in determining who recovers and who does not in strict products liability cases in which the plaintiff cannot satisfy the *Dillon* requirements. The approach taken by the *Kately* court in applying a user-bystander distinction appears to add another rigid foreseeability requirement to cases sounding in strict products liability. A more flexible approach would be to regard the plaintiff's "user" status as a consideration in deciding whether the product-related incident was one that would cause serious psychic harm to a person with a normal psyche.

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in addition to the operator. *See id.* Therefore, as the one responsible for observing, the daughter was a direct victim of the defective product, and not a bystander. *See Kately*, 148 Cal. App. 3d at 588-89, 195 Cal. Rptr. at 910.

[214] *Kately*, 148 Cal. App. 3d at 588, 195 Cal. Rptr. at 909.

2. New York

Much has been made of the divergent views taken by the California and New York courts on the issue of bystander recovery for emotional distress.[215] Even though New York was a front runner in protecting the interest in psychic equilibrium from negligent injuries,[216] the New York Court of Appeals in *Tobin v. Grossman*[217] held that a bystander may not recover for psychic harm caused by witnessing an accident that causes severe physical injury to a third person.[218] In spite of its recognition of the importance of the interest in psychic equilibrium, the *Tobin* court found that the difficulty of limiting liability in bystander situations was too great.[219]

In *Vaccaro v. Squibb*,[220] the only New York case to consider recovery for psychic harm based on strict products liability, the plaintiffs were parents of a child born with severe birth defects allegedly caused by an anti-miscarriage drug administered to the mother during her pregnancy. The Appellate Division, though holding that *Tobin* precluded the father from recovering because he had not ingested the drug, held that the mother stated a cause of action because a duty was owed directly to her as a user of the product.[221] In other words, the court made a distinction between the mother as a user of the drug and the father as a bystander. Because bystanders may not recover for psychic harm in New York, the father was denied relief.

The Court of Appeals reversed, dismissing the wife's cause of action.[222] Because it was a memorandum opinion there is no analy-

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[215] *See, e.g.*, Simons, *supra* note 15, at 1-2; Note, *The Negligent Infliction of Mental Distress: The Scope of Duty and Foreseeability of Injury*, 57 N.D.L. REV. 577, 577-78, 586 (1981).

[216] *See, e.g.*, Mitchell v. Rochester Ry., 151 N.Y. 107, 109, 45 N.E. 354, 354 (1896). The *Mitchell* court held that there could be recovery for the physical consequences of mental suffering if there was some impact. *Id.* at 110, 45 N.E. at 355. The impact requirement was relaxed in Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931), where the court affirmed a lower court's refusal to charge the jury that impact harm was required for damages for fright or shock. *Id.* at 239, 177 N.E. at 435. The court stated that "[m]ental suffering or disturbance, even without consequences of physical injury, may in fact constitute actual damage." *Id.* at 235, 177 N.E. at 432.

[217] 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

[218] *See id.* at 611, 249 N.E.2d at 419-20, 301 N.Y.S.2d at 555.

[219] *See id.* at 616-18, 249 N.E.2d at 423-24, 301 N.Y.S.2d at 559-61.

[220] 71 App. Div. 2d 270, 422 N.Y.S.2d 679 (1st Dep't 1979), *rev'd*, 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

[221] *See id.* at 277-78, 422 N.Y.S.2d at 683-84.

[222] 52 N.Y.2d 809, 418 N.E.2d 386, 436 N.Y.S.2d 871 (1980).

sis by the majority. The only indication of the court's reasoning is in the dissent, which stated that the case was dismissed because the majority had overlooked the fact that the mother was a consumer of the drug, and, instead, focused on her as a bystander suffering through concern for her deformed child.[223] Because the *Vaccaro* court did not consider the strict liability aspects of the case, it is difficult to conclude what inferences may be drawn from the decision.[224] Although nothing in the opinion precludes recovery when

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[223] *See id.* at 812, 418 N.E.2d at 387, 436 N.Y.S.2d at 872 (Fuchsberg, J., dissenting).

[224] Courts in three other jurisdictions have considered psychic harm in the context of strict products liability. None of these courts addressed the questions raised by extending recovery in a strict liability case. In General Motors v. Grizzle, 642 S.W.2d 837 (Tex. Civ. App. 1982), a Texas court affirmed a $40,000 award for psychic harm to a mother who came upon an accident involving her daughter moments after it occurred. *Id.* at 844. The court found the defendants strictly liable for injuries resulting from a design defect in a pickup truck. *Id.* at 842-43. The majority focused on the question of whether a parent who did not sensorily experience the accident that harmed a child could recover for psychic harm. The court found it foreseeable that observation of the consequences of the accident moments after it occurred could cause psychic harm. *Id.* at 844. The court made no comment on the fact that the theory of the case was strict liability and that the psychic harm cases relied on were grounded in negligence.

In a rather backhanded manner, the Supreme Court of Nevada approved an award for psychic harm based on strict products liability. In Jacobson v. Manfredi, 679 P.2d 251 (Nev. 1984), a small child seriously injured his intestinal tract when he drank liquid solder. *Id.* at 252. In discussing the jury's award of damages for psychic harm to the mother, and its failure to award damages to the father, the court noted that the jury could have found that the father had misused the product. *Id.* at 257. The court noted that since the mother "was not using the product and did not leave it within [the child's] reach, the jury again consistently could have found she was entitled to recover on a strict products liability theory." *Id.* Although this statement was dictum, it is an indication that the Nevada court is willing to protect the interest in psychic equilibrium in strict products liability actions.

An unusual case decided by the Federal District Court for the Southern District of Mississippi was Lovelace v. Astra Trading Corp., 439 F. Supp. 753 (S.D. Miss. 1977), in which the plaintiff claimed damages based on negligence and strict products liability when an allegedly defective hair dryer caused a fire which severely damaged his house. *Id.* at 755. Although the plaintiff was not present when the fire first started, he returned home to see his house burning. *Id.* Eighteen days later, he was diagnosed as having high blood pressure, which led to bypass surgery, and ultimately permanent disability. *Id.* The plaintiff alleged that his condition was caused by the fire. The defendant moved for partial summary judgment, claiming that Mississippi did not extend recovery under strict products liability to bystanders, and sought a declaration that recovery, if any, be limited to property damage. *Id.* at 755-56. The court denied the motion, holding that Mississippi would recognize bystander recovery in strict products liability, and that the plaintiff could recover for his personal injuries if he could establish that the fire caused the injury. *Id.* at 760-61. In reaching its conclusion that summary judgment was inappropriate, the court noted that section 402A of the RESTATEMENT (SECOND) OF TORTS allows for recovery for personal injuries arising from the use of a defective product, and that the foreseeability of injury, which it found to be at the heart of a strict liability case, is a question for the trier of fact. *Id.* at 761. Obviously, the plaintiff's injuries were caused not by any personal contact with the defective

the theory of the action is strict products liability, the resistance to bystander recovery may prevent most psychic harm victims from recovering.[225] The conclusion reached by the majority of the Court of Appeals casts doubt on whether "user" status is an important consideration.

3. Illinois

The Illinois courts also have considered the question of whether bystander recovery for psychic harm is available in a strict products liability case. Unlike the emotional distress plaintiff in California, the plaintiff in Illinois has had a significantly more difficult task. Although Illinois has adopted section 402A and has extended it to bystanders,[226] the rights of the plaintiff seeking recovery for emotional distress have been uncertain.[227]

The issue was first addressed by an Illinois court in *Woodill v. Parke Davis & Co.*[228] In *Woodill*, psychic harm was claimed by the mother of a child born with brain damage, allegedly caused by the administration of pitocin, a drug used to induce labor.[229] In dictum, the Illinois Court of Appeals rejected out of hand any suggestion that recovery for emotional distress should be allowed under strict products liability, claiming that section 402A of the Restatement "expressly limits recovery to *physical harm.*"[230] On appeal,

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product, but rather, by the psychic shock that occurred when he saw the damage to his home. Rather than addressing the question of whether Mississippi recognized recovery for physical manifestations of psychic trauma in strict products liability, the court simply assumed that such a circumstance presented a question of fact for the jury.

[225] A recent New York products liability decision based on a negligence theory indicates that even if the plaintiff can successfully cast himself as a user rather than as a bystander, the road to recovery is by no means clear. In Kennedy v. McKesson, 58 N.Y.2d 500, 448 N.E.2d 1332, 462 N.Y.S.2d 421 (1983), the plaintiff, a dentist, alleged that a faulty anesthetic machine caused the death of his patient. *Id.* at 502-03, 448 N.E.2d at 1333, 462 N.Y.S.2d at 421-22. The court stated that "there is no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty, and, even as to a participant to whom a duty is owed, such injury is compensable only when a direct, rather than a consequential, result of the breach." *Id.* at 506, 448 N.E.2d at 1335, 462 N.Y.S.2d at 424. Because the direct result of the breach was the death of the patient, Kennedy's psychic harm was merely consequential. *See id.* at 506-07, 448 N.E.2d at 1335-36, 462 N.Y.S.2d at 424-25.

[226] *See, e.g.*, Palmer v. Aico Distrib. Corp., 82 Ill. 2d 211, 216, 412 N.E.2d 959, 965 (1980).

[227] *See* Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 555, 457 N.E.2d 1, 5 (1983). The Illinois Supreme Court only recently rejected the impact requirement in favor of a "zone-of-physical danger" approach. *Id.*

[228] 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

[229] *Id.* at 350, 374 N.E.2d at 684-85.

[230] *Id.* at 355, 374 N.E.2d at 687-88; *see* RESTATEMENT (SECOND) OF TORTS § 402A

the Illinois Supreme Court referred to the lower court's dictum as "an alternative ground for holding that count II failed to state a cause of action,"[231] and adopted the decision of the court of appeals on that point.[232]

In *Rickey v. Chicago Transit Authority*,[233] the Illinois Court of Appeals again considered whether recovery for emotional distress is available under a strict products liability theory. In *Rickey*, the plaintiff's brother suffocated when his scarf became entangled in an escalator mechanism.[234] The plaintiff, who witnessed this event, experienced severe emotional, and behavioral disturbances. He was unable to conduct normal activities at home and at school, and required continuing psychiatric care. Citing *Woodill* for the proposition that Illinois does not recognize a cause of action for mental and emotional distress under a strict products liability theory, the court summarily rejected the plaintiff's strict liability claim noting that the plaintiff had cited no authority in support of such a theory.[235]

Unless Illinois courts reconsider this restrictive approach to the physical harm requirement in strict products liability, plaintiffs seeking recovery for psychic harm will continue to fail. It is difficult to imagine a more deserving victim than the plaintiff in *Rickey*, whose life was shattered by his observation of his brother's accidental death. His psychic injuries were serious, easily verifiable, and certainly understandable under the circumstances. To deny him recovery, regardless of which legal theory is used, highlights the absurdity of denying the interest in psychic equilibrium full protection.

4. Iowa

The Supreme Court of Iowa is the only state court of last resort to have recognized bystander recovery of damages for psychic harm based on a strict products liability theory. The decision in *Walker v. Clark Equipment Co.*[236] came hard on the heels of *Barnhill v. Davis*, in which the same court had extended recovery for

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(1965).

[231] 79 Ill. 2d 26, 38, 402 N.E.2d 194, 200 (1980).

[232] *Id.*

[233] 101 Ill. App. 3d 439, 428 N.E.2d 596 (1981), *aff'd*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983).

[234] *Id.* at 440, 428 N.E.2d at 597.

[235] *Id.* at 442-43, 428 N.E.2d at 599.

[236] 320 N.W.2d 561 (Iowa Ct. App. 1982).

negligent infliction of emotional distress to bystanders.[237]

The court in *Walker*, recognizing that the stage was set in Iowa for extending the *Barnhill* doctrine, held that bystanders may recover damages for psychic harm under a strict products liability theory.[238] Unfortunately, instead of engaging in any reasoned analysis or explanation of why a doctrine rooted firmly in negligence should be transplanted to strict products liability, the court adopted a "why not" approach.[239] Although the court's holding is laudable in its recognition that the interest in freedom from psychic harm should be granted full protection, the lack of analysis is disconcerting. Apparently the *Walker* court proceeded on the assumption that, because the facts of the case are the same and the damages suffered are the same, the approach to the case should be the same regardless of the legal theory asserted.[240] There are, however, differences between negligence and strict products liability that should not be ignored. Unless courts specifically address those differences and present supportable methods for protecting the interest in psychic equilibrium under both theories, the confusion surrounding the area will never abate and courts leery of the interest in psychic equilibrium will continue to resist affording it full protection.

5. South Dakota

In *Gnirk v. Ford Motor Co.*,[241] a recent federal case interpreting South Dakota law, the plaintiff sued for psychic harm that she suffered as a result of witnessing the death of her child.[242] Although South Dakota had previously refused to award damages to bystander plaintiffs in both negligence and strict products liability cases,[243] the court in *Gnirk* neatly sidestepped this issue by charac-

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[237] 300 N.W.2d 104, 105-06 (Iowa 1981).

[238] *See* 320 N.W.2d at 563.

[239] *See id.* The court initially supported its holding by citing prior Iowa cases that had extended recovery under strict products liability to bystanders. *Id.* The court then noted that once liablity is found, the recovery should be the same under theories of warranty, strict liability, or negligence. *Id.*

[240] *See id.*

[241] 572 F. Supp. 1201 (D.S.D. 1983).

[242] *See id.* at 1201-02 & n.1. In *Gnirk*, the plaintiff had momentarily gotten out of her car to open a fence, and left the car running. *Id* at 1202. The car shifted into reverse and rolled into a lake, drowning the plaintiff's son. *Id.* As a result, the plaintiff alleged permanent psychological injury, physical illness, insomnia, and depression. *Id.*

[243] For a discussion of South Dakota products liability law, *see generally* Dugan, *Reflections on South Dakota's Trifurcated Law of Products Liability*, 28 S.D.L. REV. 259

terizing the plaintiff as a "user," rather than a bystander, because she had been driving the defective car shortly before it malfunctioned and caused the death of her child.[244] Apparently, the court assumed that a cause of action for psychic harm exists under section 402A as long as the plaintiff can make a sufficient showing of resulting physical symptoms. Thus, it focused on the physical harm question and concluded that the increased understanding of the relationship between physical and psychic injury justified finding that physical injury includes depression, weight gain, nervousness, and nightmares.[245] It found substantial support in case law and in the Restatement for its conclusion that the plaintiff's injuries were sufficient to satisfy the physical harm requirement.[246]

In *Gnirk*, the court's characterization of the plaintiff as a user rather than a bystander made it possible for her to recover in a jurisdiction that does not generally recognize either bystander recovery for psychic harm or bystander recovery in strict products liability. Obviously, jurisdictions such as South Dakota need to address these troubling dilemmas directly. An approach that would take into account the seriousness of the harm and the reasonableness of the plaintiff's reaction under the circumstances would allow courts to avoid the machinations engaged in by the *Gnirk* court to provide recovery to a genuinely injured plaintiff.

D. *Cancerphobia*

The recent upsurge in "cancerphobia"[247] claims presents a unique class of cases in which products liability and psychic injury coincide. Many of the cases have proceeded in negligence rather than strict liability,[248] but the critical issues require attention in an

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(1983).

[244] *See Gnirk*, 572 F. Supp. at 1202-03.

[245] *See id.* at 1204-05.

[246] *Id.*; *see* Haught v. Maceluch, 681 F.2d 291, 301-02 (5th Cir. 1982); D'Ambra v. United States, 396 F. Supp. 1180, 1183-84 (D.R.I. 1973), *aff'd*, 518 F.2d 275 (1st Cir. 1975); Corso v. Merrill, 119 N.H. 647, 658, 406 A.2d 300, 307 (1979); *see also* RESTATEMENT (SECOND) OF TORTS § 436A comment c (1965) (physical manifestations resulting from emotional disturbance may be classified as illness).

[247] The term "cancerphobia" appeared as early as 1958, in Ferrara v. Galluchio, 5 N.Y.2d 16, 19, 152 N.E.2d 249, 251, 176 N.Y.S.2d 996, 998 (1958). Cancerphoboia describes the apprehension that the plaintiff, as a result of being exposed to a known carcinogen, will suffer cancer in the future. *See id.*

[248] *See, e.g.*, Payton v. Abbott Labs, 386 Mass. 540, 542-44, 437 N.E.2d 171, 173-74 (1982) (DES case); *see* Fusco v. Johns-Manville Prods. Corp., 643 F.2d 1181, 1183 (5th Cir. 1981) (asbestos case).

examination of psychic harm in products liability. The most frequent claims for recovery based on a "cancerphobia" theory have been asserted by DES daughters and mothers,[249] and asbestos inhalers and their spouses.[250] Thus, the cases fall into both the "fear for oneself" category and the "bystander" category.

The success rate for plaintiffs in the DES and asbestos cases has not been high, even when the devastating effects of the disease are apparent,[251] so it is not surprising that the DES or asbestos exposed plaintiff who claims as harm the fear of developing a dreaded disease, has an even more difficult road to success. In fact, courts, even courts demonstrating a willingness to broaden protection in the psychic harm area, have been steadfast in their refusal to grant relief to the modern cancerphobia victim.[252]

To determine why cancerphobia claims have been unsuccessful, it is necessary to examine the nature of the injury suffered by a DES daughter and the asbestos inhaler, who have no physical manifestations of disease. DES or asbestos exposure increases the statistical likelihood of contracting cancer.[253] This knowledge can

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[249] *See, e.g.*, Plummer v. Abbott Labs, 568 F. Supp. 920, 921 (D.R.I. 1983); Weatherill v. University of Chicago, 563 F. Supp. 1553, 1560 (N.D. Ill. 1983); Payton v. Abbot Labs, 386 Mass. 540, 542, 437 N.E.2d 171, 173 (1982). It has been estimated that by 1980 there were as many as 1,000 DES lawsuits filed. *See* Podges, *DES Ruling Shakes Products Liability Field*, 66 A.B.A. J. 827, 827 (1980). Diethylistibestrol (DES) is a synthetically produced estrogen that was used to avoid complications during pregnancy. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963 (1978). It was subsequently determined that DES caused clear-cell adencarcinoma of the uterus and vagina, cancer, and various other pre-cancerous abnormalities. *See id.* at 964-65.

[250] *See* Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 871 (1983). Asbestos-related litigation has accounted for more than 16,000 cases being filed in federal and state courts. *Id.*

[251] *See* Note, *Tort Actions for Cancer, Deterrence, Compensation, and Environmental Carcinogens*, 90 YALE L.J. 840, 847 (1981). The long latency period between exposure and manifestation of disease makes it difficult to meet traditional standards of proof. Scientific knowledge may be insufficient to establish cause and effect, and valuable evidence may be lost. *See* Phillips, *Asbestos Litigation: The Test of the Tort System*, 36 ARK. L. REV. 343, 346-47 (1983). The plaintiff may be unable even to identify which of a variety of manufacturers actually manufactured the product that caused the harm. *See, e.g.*, Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978).

[252] *See infra* notes 254-261 and accompanying text.

[253] *See* Comment, *supra* note 249, at 964; Comment, *Emotional Distress Damages for Cancerphobia: A Case for the DES Daughter*, 14 PAC. L.J. 1215, 1216 (1983). Once DES is administered, the patient is exposed to a 100 times greater risk of developing cancer. Comment, *supra*, at 1216. Although some estimates show that cancer develops in one of every 250 to 1000 DES-exposed daughters, *see* Comment, *supra* note 249, at 965 n.7, others claim it occurs in only one of every 100,000, *see* Comment, *DES and Emotional Distress*: Payton v. Abbott Labs, 37 U. MIAMI L. REV. 151, 152 n.5 (1982).

cause severe anxiety or fear of developing cancer in the future, which has a serious impact on the lives of the DES or asbestos exposed plaintiff, even if she never develops cancer. This is a different type of emotional suffering from the psychic shock experienced through seeing a loved one injured or through being in an accident in which one has a sudden and immediate fear for one's own life, or through handling an instrumentality that turns out to be the agent of another's death. The kind of psychic harm suffered by a cancerphobia victim is the torment of wondering if and when a horrible disease will be contracted. Although not traumatic in a clinical sense, it is a gnawing, wearing, brooding kind of anxiety that can be as damaging as a sudden trauma. The question in a products liability context is whether a manufacturer who is responsible for creating this potential for future harm should be responsible for the present anxiety and fear that future harm will occur.

Further, because claims have been made by DES mothers and asbestos spouses, it is necessary to determine whether they state a cognizable claim for psychic harm based on the fear that their loved ones might one day develop cancer. Once again, the theory that a court chooses depends upon the state of the law in the particular jurisdiction. For the sake of clarity, the cases will be discussed according to the status of the plaintiff as either a potential cancer victim or a bystander fearing for a loved one.

1. Fear For Self

a. *Physical Harm*

In *Payton v. Abbott Laboratories*,[254] the Supreme Judicial

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The inhalation of asbestos has been implicated as the cause of asbestosis, lung cancer, and other forms of gastrointestinal cancers. *See Hazards of Asbestos Exposure: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 2-11 (1982) (testimony of Dr. Irving Selikoff). It has been estimated that nine million American workers were exposed to asbestos during the 1940's and 1950's. *Id.* at 3. Estimates of asbestos-related deaths vary from 8500 to 67,000. *See* Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L.J. 55, 55 (1982); Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 580 (1983).

[254] 386 Mass. 540, 437 N.E.2d 171 (1982). In *Payton*, the Supreme Judicial Court of Massachusetts addressed the following question:

> Does Massachusetts recognize a right of action for emotional distress and anxiety caused by the negligence of a defendant, in the absence of any evidence of physical harm, where such emotional stress and anxiety are the result of an increased statistical likelihood [that] the plaintiff will suffer serious disease in the future?

Court of Massachusetts justified its decision to refuse recovery for psychic harm absent physical injury in a cancerphobia case by resorting to the standard reasons for rejecting claims of psychic harm. The court focused on fear of a flood of litigation, fear of fictitious claims, and reluctance to subject defendants to liability for mental distress for mere negligent conduct.[255]

The physical injury requirement may be a difficult obstacle for cancerphobia victims to overcome, because many of the physical manifestations alleged by those who have had a sudden psychic shock may not occur in the cancerphobia victim. The reasons already asserted for not requiring physical injury in a psychic harm case, however, apply with equal force in a cancerphobia case.[256]

b. *Present Injury*

The approach taken in two recent opinions by the Court of Appeals for the Fifth Circuit has seriously jeopardized claims brought by not-yet-ill cancerphobia victims, regardless of the legal theory of the plaintiff's case or the approach taken by the particular jurisdiction toward recovery for psychic harm. In *Jackson v. Johns-Manville Sales Corp.*, [257] and *Adams v. Johns-Manville Sales Corp.*,[258] pre-cancerous asbestos workers sued to recover for potential cancer and for mental distress caused by their fear of contracting cancer.[259] The Fifth Circuit held in both cases that the evidence relating to an increased statistical risk of cancer caused by asbestos inhalation was inadmissible because a cause of action for cancer had not yet accrued at the time of trial.[260] The court held that a plaintiff would suffer little detriment by being required to wait until the physical manifestation of cancer before bringing suit for the cancer or the psychic harm suffered through cancerphobia.[261]

In concluding that the plaintiffs had no present cause of action for potential cancer, the court failed to distinguish between something that has not yet happened—in this case, cancer—and

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Id. at 544, 437 N.E.2d at 174.

[255] *Id.* at 552-54, 437 N.E.2d at 178-79.

[256] *See supra* notes 77, 138-143 and accompanying text.

[257] 727 F.2d 506 (5th Cir. 1984).

[258] 727 F.2d 533 (5th Cir. 1984).

[259] *See Adams*, 727 F.2d at 535; *Jackson*, 727 F.2d at 510.

[260] *See Adams*, 727 F.2d at 537; *Jackson*, 727 F.2d at 522.

[261] *Adams*, 727 F.2d at 537; *Jackson*, 727 F.2d at 521.

something that has already happened—a present fear that cancer will occur in the future. The effect of the holdings in *Jackson* and *Adams* is to deny protection to the interest in psychic equilibrium and once again to relegate psychic harm to the status of a parasitic claim compensable only when appended to a cause of action for physical injury.

The approach taken by the federal district court in *Wetherill v. University of Chicago*[262] is preferable. In *Wetherill*, which involved a cancerphobia claim brought by DES daughters who had no signs of disease, the plaintiffs sought to introduce evidence on the causal relationship between DES and cancer to establish the reasonableness of their fears.[263] The court made it clear that the plaintiffs sought recovery *not* for the increased risk of cancer but for their *fear* of developing cancer. It required only a reasonable fear of future injury, not a reasonable certainty of future injury. The court concluded that the plaintiffs needed to establish only a causal link between fear of future injury and the defendant's tortious conduct.[264] Thus, to establish cancerphobia, the plaintiff need show only that the defendant exposed him to a carcinogen, that the exposure resulted in an increased likelihood of developing cancer, and that the anxiety being suffered has caused serious psychic harm.

The approach taken by the Wetherill court is consistent with a recognition that tortious invasions of psychic equilibrium should be compensated if serious harm occurs. Unlike the Fifth Circuit in *Jackson* and *Adams*, the *Wetherill* court clearly distinguished between present psychic harm and potential physical harm. Although a certain amount of inconvenience might accompany the need to bring two lawsuits, one for psychic injury and one for subsequent physical injury, any other approach ignores the fact that a legally protected interest has been invaded.

i. Cancerphobia of DES Mothers and Asbestos Spouses

In a few of the cancerphobia cases, DES mothers and asbestos spouses have claimed that they themselves will also contract cancer.[265] Although these plaintiffs have been uniformly unsuccessful,

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[262] 565 F. Supp. 1553 (N.D. Ill. 1983).

[263] *Id.* at 1559.

[264] *See id.*

[265] The DES mothers claim they will contract cancer through their ingestion of DES,

the reasons for rejection of these claims have varied.

One theory used to justify rejection, which is particularly alien to recognition of psychic equilibrium as a protectable interest, is the idea that the psychic harm must be attributable to a specific event or accident.[266] The inference to be drawn is that only certain kinds of invasions of psychic equilibrium that result in psychic harm will result in liability. A sudden psychic shock or trauma that produces psychic harm may be recognized, but an invasion that gives rise to long term brooding and depression apparently will not. If the psychic harm is serious and reasonable under the circumstances, such a distinction is irrational. In the context of the DES mothers and asbestos spouses, the denial of recovery is not disturbing because the plaintiffs have been unable to establish an increased likelihood of developing cancer. In some cases, the harm may be serious, but in the absence of any medical evidence that ingesting DES or living with an asbestos worker causes cancer, it can safely be said that a person with normal ability to cope would not suffer serious psychic harm under such circumstances. However, the requirement of an immediate psychic shock or trauma is disturbing since it has the potential for being applied to deny recovery to DES daughters or asbestos inhalers. Certainly, anxiety and depression caused by a person's knowledge that he has an increased likelihood of developing cancer could result in serious psychic harm, even in a person with normal ability to cope.

ii. Bystanders

Several cases have been brought by DES mothers and asbestos spouses claiming recovery based either on their fear that their loved ones will contract cancer or on their mental anguish brought on by watching the suffering of loved ones who already have contracted it.[267] These claims also have been rejected. Some courts have denied recovery for the reason that bystander recovery is limited to a plaintiff who has witnessed an identifiable, traumatic

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and the wives of asbestos victims through close association with their husbands. *See, e.g.*, Tysenn v. Johns-Manville Corp., 517 F. Supp. 1290, 1294 (E.D. Pa. 1981) (asbestos case); Amader v. Johns-Mansville Sales Corp., 514 F. Supp. 1031, 1032 (E.D. Pa. 1981) (asbestos case); Mink v. University of Chicago, 460 F. Supp. 713, 715 (N.D. Ill. 1978) (DES case).

[266] *See Amader*, 514 F. Supp. at 1032; Nutt v. A.C.&S. Inc., 466 A.2d 18, 23 (Del. Super. Ct. 1983).

[267] *See Mink*, 460 F. Supp. at 719; *Amader*, 514 F. Supp. at 1033; *Nutt*, 466 A.2d at 25.

event affecting a close family member.[268] This is a variation on the theory discussed above. Courts taking this approach apparently have concluded that the law will not protect the interest in psychic equilibrium from an invasion that causes long term concern for the health of a loved one, rather than immediate shock at seeing a loved one injured. Although this justification for denying recovery is irrational, there may be some reasons to deny recovery to family members in cancerphobia cases. Hearts go out to those who must helplessly stand by watching their loved ones suffer or waiting for a horrible misfortune to befall them, but interests in limiting liability may militate against recovery in this kind of bystander case. An application of the tests suggested earlier should provide further support for such a denial of redress. The anger, frustration, and grief family members of DES or asbestos exposed persons experience may be great, but it is unlikely that it will result in serious psychic harm. In the rare case in which serious harm has occurred, the conclusion would likely be that the normally constituted person would not have suffered serious harm.

This approach is preferable to distinguishing between a sudden psychic shock and long term suffering, because it provides flexibility and a greater chance that the seriously harmed plaintiff will recover. The sudden psychic shock requirement would prevent recovery by a DES daughter or asbestos inhaler who could satisfy the "serious harm to a normally constituted psyche" requirement.

CONCLUSION

"The entire history of the development of tort laws shows a continuous tendency to recognize as worthy of legal protection interests which previously were not protected at all."[269] The slow journey of the once unprotected interest in psychic equilibrium toward legal protection typifies this "continuous tendency." At last, the day has arrived to recognize that the destination has been

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[268] *See, e.g., Amader*, 514 F. Supp. at 1032-33. The courts in DES and asbestos bystander cases have taken the *Dillon v. Legg* foreseeability factors and applied them to a factual situation that is not even remotely similar. This is one of the difficulties with a rote application of arbitrary "foreseeability factors." Whether the decision of the California Supreme Court in Ochoa v. Superior Ct., 39 Cal. App. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985), in which that court recognized a claim by a parent who observed the gradual deterioration of a child but not his death, will have an impact in the cancerphobia area remains to be seen.

[269] RESTATEMENT (SECOND) OF TORTS § 1 comment e (1965).

reached. The interest in psychic equilibrium has come the final mile and should be protected from tortious invasions of all kinds. However, in the cases in which the interest in psychic equilibrium and strict liability coalesce, there is a need to recognize and accomodate the competing interests in the efficient administration of justice and the avoidance of overly burdensome and indeterminable liability. The inconsistency in reasoning and results is obvious. The foregoing review of cases illustrates the need for a uniform approach which takes into account all the interests at stake. A determination of liability reached through a broad determination of the scope of the risk and tempered by a conclusion that the psychic harm suffered by one with a normal ability to cope should satisfy any remaining fears that protection of psychic equilibrium in strict products liability would result in runaway liability. If this approach is taken, no reason remains to deny the interest in psychic equilibrium full protection regardless of the nature of the tortious invasion or the theory of the plaintiff's case.